TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 85

ISIDORE EDELMAN, PETITIONER,

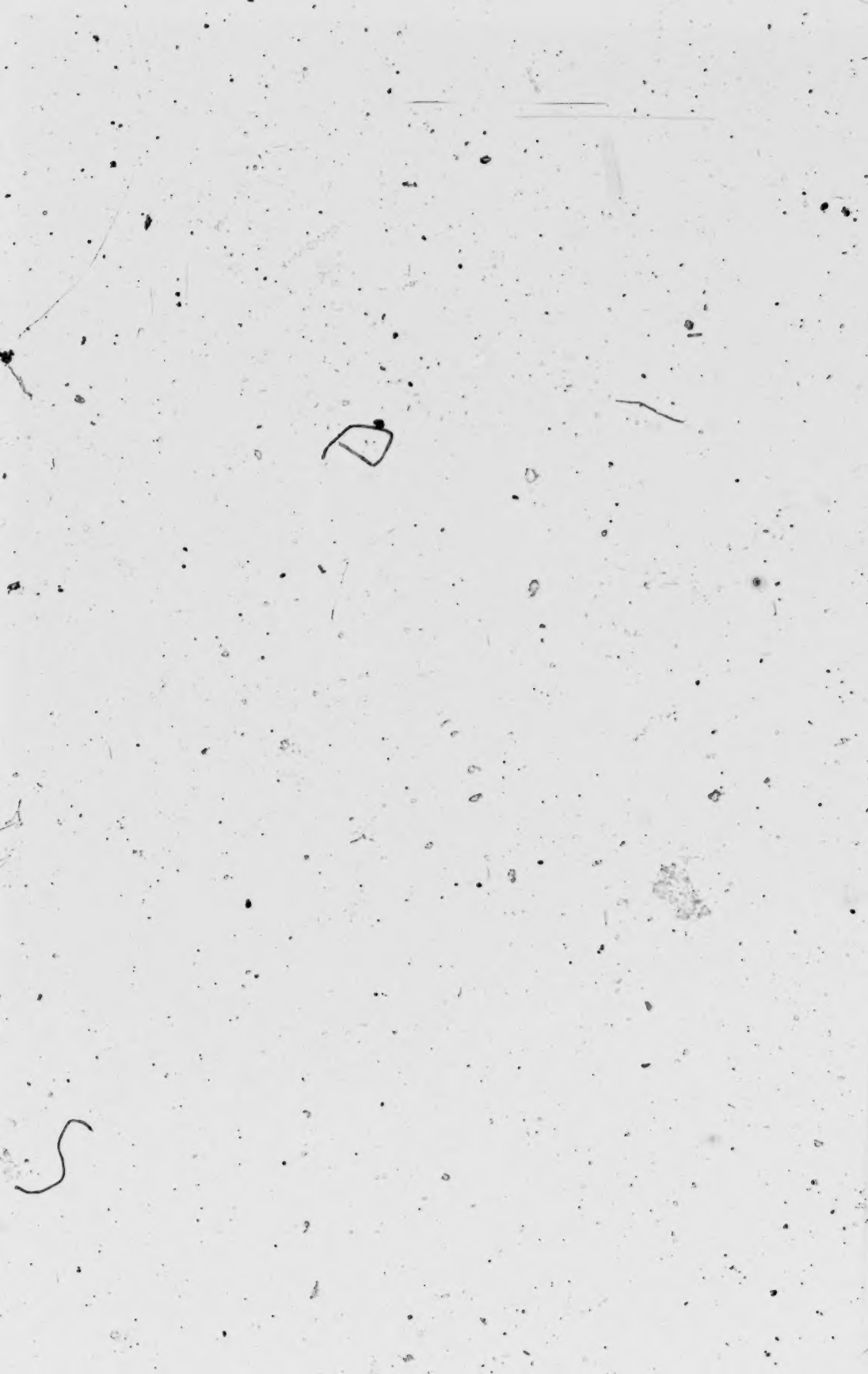
vs.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

PETITION FOR CERTIORARI FILED JANUARY 18, 1952

CERTIORARI GRANTED MAY 26, 1952



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INDEX

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—2296

[fol. 1] [File endorsement omitted]

IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Cr. A. 2795

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

ISIDORE EDELMAN, Defendant and Appellant

NOTICE OF APPEAL—Filed December 13, 1949

To the above entitled Court and to the Honorable Byron J. Walters, Judge in Division 15 thereof, and to Urban F. Emme, Clerk of said Court; and to Ray L. Chesebro, City Attorney; and Don M. Redwine, Assistant City Attorney:

You, and each of you, will please take notice that defendant herein intends to and does hereby appeal to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles, from the verdict, and the judgment and sentence of the above entitled court and from the order denying defendant's motion for a new trial.

Dated: December 13th, 1949.

Leo Gallagher, Attorney for Defendant.

Receipt of copy of within notice acknowledged.
Ray L. Chesebro, City Attorney of Los Angeles, By P. E. Grey, Deputy.

Bond on appeal fixed at $250.00. Walters, Judge.

[fol. 2] [File endorsement omitted]

IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

ENGROSSED STATEMENT ON APPEAL—Filed June 18, 1951

Be it remembered, that the complaint herein charges defendant with violation of P. C. 647 (5), in that defendant on

September 22, 1949, was a dissolute person. The trial began in Division 15 on October 26, 1949, and continued through nine trial days; the jury finding defendant guilty on November 7, 1949, after about ten hours of deliberation.

The court denied defendant's motion for a new trial on December 12, 1949. Judgment was entered against defendant and he was sentenced to jail for 90 days. Bail on appeal was fixed at $250. At the same time the defendant was given a 90 days jail sentence on a charge of "begging,"—sentences running concurrently. Defendant filed his written [fol. 3] Notice of Appeal December 13, 1949.

Facts

Defendant summarizes the trial as follows:

Frederic Boyd, for the prosecution, states that on numerous occasions he heard defendant ask for money at Pershing Square; that defendant had collected $54.50 in one week; that he heard defendant say that he "had a right to ask for funds and had a right to accept contributions; that organizations which he had consulted had told him so."

Boyd stated that he had heard defendant some 75 times; that he had heard him call people in the audience "bastards," in the presence of three women; that also in the presence of three women he heard defendant refer to an incident where some wealthy men had hired a young woman to bathe before numerous men in a bathtub filled with wine; and that the men had drunk the wine saturated with the juice of the woman; that these men were arrested and that the case was dismissed, which showed the sentiment of the court.

Witness Boyd further testified that Edelman accused one man of being a pen-prostitute and that he also referred to intellectual prostitutes; that defendant referred to witness as a liar and stool pigeon; that defendant was giving out literature, inviting his listeners to give him money for this literature; that on one occasion defendant pointed out witness, saying: "Look around and see the man who testified against me," and the people jeered witness.

On cross-examination, Boyd stated that for full six months last past he had drawn unemployment insurance and obtained a job immediately the unemployment insur-

ance ran out; that Edelman had talked for two years last past without police interference until recently; that witness had on three occasions visited the city attorney's office and talked to Boyd Taylor and his secretary but did not tell [fol. 4] Taylor the matters he had just testified to; that witness had never heard defendant heckled; that defendant had accused a person in his audience of having been convicted of a morals charge involving young girls; that defendant had criticized court trials, stating that the juries were picked and the trials were cut and dried affairs; that the prosecutor knows the background of jurors and how they have voted in other cases; that one Bili Brooks had paraded up and down in the park in the immediate vicinity of defendant's meeting, with a red flag containing anti-communist slogans; that a policeman was standing by Edelman at the time.

Witness testified that he had never used the word "bastard" except repeating it in court, and had never heard the word used among the 3000 employees at North American Aviation; that Edelman had appealed for funds for his legal defense and to sustain himself; that a police officer had told witness from memory Edelman's communist party card number, being 1192; that he knew of Edelman's having been thrown into Pershing Square fountain four times; that he was not interested in knowing who the persons were who threw him into the fountain; that on a recent occasion Edelman called for a show of hands of those who did not wish to hear him speak and four persons raised their hands; that Edelman called one Shapiro on 15 occasions a stool pigeon; that Edelman accused one Richard Lamb of embezzling funds; that Lamb was present and said nothing; that witness had seen complaining witness Langlois for some two months at defendant's meetings but never saw him heckle.

Witness testified that defendant said that Los Angeles needed a new police force and mayor; that defendant spoke against the government, referred to the flag as a cloth, but witness did not remember just what he said about the flag because witness was not interested with reference to statements about the government; that Edelman ridiculed and baited men in uniform; that a uniformed man threatened to [fol. 5] throw Edelman into the park fountain; that police

were present at times when defendant stated that the uniform was being disgraced; that defendant referred to uniformed men as rowdies and adolescents; that the expressions "pen-prostitute" and "intellectual prostitute" are obscene; that defendant charged that the police were protecting and conniving with hoodlums and that the police and city attorney's office and hoodlums were working together to prevent public speaking in Pershing Square; that defendant invited the public to pack the court room during his trials.

Edward Walker of the Bureau of Police Records and Identification (called by defendant out of order as a convenience to the police) stated that his record shows 100,000 drunk arrests; that his records show arrests other than vagrancy; that there are about 1500 vagrancy arrests per year.

One Shockley stated that he was an evangelist; that he had been subpoenaed by defendant although he had never discussed the case with defendant or his attorney; that the people in Pershing Square needed the gospel; that Edelman came within 25 feet of his gospel meeting, drawing away his crowd and thereby preparing himself for retribution; that defendant had charged Richard Lamb with money discrepancies in connection with the Civic Betterment Committee; that witness had heard the bathtub statement of Edelman and thought it was a vile thing to say in public.

On cross-examination, witness stated that he made his living by accepting contributions for religious pamphlets and bibles; that this was the sole source of his income; that he distributed calendars in exchange for money. (See plaintiff's Exhibit A, in which a calendar, covered by a holy picture, is not a 1949 calendar). Witness refused to answer as to whether or not he solicited or accepted contributions in Pershing Square, on the ground that his answer might incriminate him.

[fol. 6] Witness stated that he had heard defendant at least 25 times; that Richard Lamb paid witness 10 cents per member obtained for the Civic Betterment Committee; that a laborer was worthy of his hire and that witness does not work for nothing. In this regard witness stated that defendant had accused witness of helping Lamb defraud people out of money; that witness knew of no ac-

counting of funds received by Lamb; that witness had read about the woman-in-the-bathtub incident in the newspapers, and that Earl Carroll was the party involved as defendant in that incident.

One *D. A. Madero* stated that on October 19, 1949, he was standing near defendant, talking; that defendant tapped him on the shoulder and told him to be quiet; that the witness refused to do so; whereupon defendant accused witness of a fascist attempt to break up defendant's meeting; that defendant asked for witness' name, to which witness answered, "Try and find out"; that defendant then subpoenaed him by placing a John Doe subpoena on his shoulder. That neither defendant nor his attorneys had ever talked to witness about the defendant's case.

On *cross-examination*, Madero stated that he had been a member of the "Ten Pin Bowling Club" at Des Moines, Iowa, from February 4 to July 6, 1949, and that he had been convicted of selling liquor to minors; that defendant had referred to him as a fascist bastard, a bum, dog, degenerate, outcast Jew. Witness stated that he never heard defendant heckled; that defendant refused to answer his question as to why defendant was a communist; that he heard defendant say that a certain percentage of the police were crooks; that when witness was served with a subpoena, the subpoena fell on the ground and someone stepped on it; that witness did not know whether it was Langlois stepped on it; that prior to the subpoena incident, witness had dinner with complaining witness Langlois and others, who were later talking near defendant at the time the subpoena was served and defendant charged that the [fol. 7] fascists were breaking up his meeting; that witness showed his John Doe subpoena to the police at Pershing Square who told him that a John Doe subpoena was void and for him to "draw my own conclusions" therefrom; that witness then spoke to the city attorney's office about said subpoena and was told to bring it to court and to be a state witness.

Richard Lamb testified that he had taken notes while defendant spoke; that defendant condemned American policy in Germany re the Berlin blockade; that defendant held up the "Soviet News" published in London, stating that in it one could get the truth not published in American

papers; that defendant invited contributions for his support and for the papers; that five persons made contributions; that on other occasions defendant condemned religion and the churches and said that the Catholic Church consisted of liars, promising pie in the sky; that the Pope was the master of a harem of black dressed women; that on other occasions defendant referred to his own pamphlet, "The Myth of the Iron Curtain" saying that it had been greatly praised, and asked money for his legal defense; that defendant stated that voting was a waste of time; that workers created all wealth; that workers eventually would take over and would produce for use and not for profit; that, in this regard, someone asked defendant: "What about compensation for property taken?" to which the defendant answered by charging questioner with being a homosexual; that said individual demanded a retraction four times which defendant refused to make; that he had heard defendant speak in Pershing Square at least 12 times; that defendant bawled people out, calling them "liars, crooks, vulgar names, bastards, degenerates, homosexuals; that defendant associated with Hans Heumann by speaking to him in Pershing Square; that defendant referred to witness as having stolen money, and as conniving to establish fascism in collaboration with public authorities.

On *cross-examination*, witness stated that he heard de-
[fol. 8] fendant at least fifty times; that he took notes of defendant's remarks on at least twenty occasions and transferred at least twenty of these notes to a diary "Mom and I keep," but witness refused to bring these notes to court. Witness stated that he had consulted with the FBI but not with reference to Pershing Square; that he had consulted with the city attorney's office on several occasions; that he had been called to the city attorney's office with reference to Pershing Square but never reported any statement of defendant with reference to the Pope; that the police were often present when defendant spoke; that witness did not know that Hans Heumann was a homosexual and that he also listened to Heumann speaking; that police were present; that he had notes quoting defendant as advocating force and violence, stating that a change could not be brought about except by bullets.

Witness stated that on the 19th of February, 1949, he heard defendant accuse him of stealing money in connection with Civic Betterment Committee matters; that witness had given a complete accounting of moneys received and disbursed to all members of the Civic Betterment Committee he was able to contact; that that accounting was given to them in private, not in public meeting; that he welcomed the opportunity this trial offered him to clear himself of the public charges made against him by defendant.

Witness stated that defendant taught Marxian doctrines in Pershing Square; that he, the witness, had read all of Marx's works, including the three volumes of Capital; that among Marx's works he had read were also included "The State and Revolution", "Imperialism" and "Left Wing Communism."

Witness stated that he had taught Economic History at the University of Texas in 1939, part of 1940, and the beginning of 1941; that he was a graduate of Columbia; that he had an AB degree.

Cornelius O'Hearns stated that he heard Edelman on [fol. 9] several occasions referring to uniformed Marines, present in his audience, as punks and as capitalistic cossacks.

On *cross-examination* he stated that he heard Edelman on six occasions; that on the first four occasions he heard nothing objectionable; that on the next occasion there was considerable confusion, police officers being present; that he heard defendant refer to the Marines as punks; that he saw a red flag being carried around by someone in the audience; that he heard a reference to Lamb having embezzled funds, made in Lamb's presence, and the latter said nothing; that defendant referred to crooked courts; that he referred to objectors as stool pigeons, psychos or criminals.

Bernard Langlois testified that he was the complaining witness; that he had seen defendant solicit funds; that he heard defendant refer to Marines as punks and as an insult to the uniform; that he knew various Marines, some by name; that defendant referred to the witness as a bum and a nut.

On *cross-examination* Langlois testified that he had heard defendant about 300 times; that witness had talked to Perry Thomas, Nielsen, and Burnes, all of the city attorney's office; that witness would rebut defendant and draw away his crowd, standing away 10 or 15 feet from the defendant; that defendant spoke about lack of housing and about his having been arrested many times; that witness knew Hans Heumann as a dissolute person and associated with him on different occasions; that Heumann had "made a play for me," that Heumann was a "queer" but that he never had Heumann arrested. Witness stated that he had publicly said that he, witness, was "nuts;" that he knew of a plan to duck defendant in the fountain but that he did not notify the police of this plan. Witness stated that he often shouted defendant down at 10 or 15 feet; that he saw defendant struck by Ramsey. Witness testified that he was president of the American Homestead Association of which Richard Lamb was director. He denied that he gave up the presidency because the Veterans Adminis- [fol. 10] tration threatened to cut off his hundred odd dollars a month disability allowance.

Michael Langen, stated that he heard Edelman often; that he had not seen him soliciting funds; that he had been subpoenaed by Edelman in a preceding trial.

On *cross-examination* Langen stated that defendant had said that God is not worried about men; that legislation was not fair; that housing and other economic conditions were bad; that witness never heard defendant say anything against the police; that witness is a Catholic propagandist; that witness gave out pamphlets, medals, etc.; that he never heard statements by defendant about bastards or about the Pope's harem; that he never heard defendant call anybody a liar, stool pigeon or thief; that he had seen Langlois heckle defendant; that he had heard defendant condemn lynching; that he never heard defendant say anything against the military uniform or call uniformed men rowdies, punks, bums, dogs, fascist bastards, degenerates, or outcast Jews; that he never heard defendant call any names.

One *Odom*, testified that defendant had referred to his son and other uniformed men as punks; that defendant had referred to a fascist police state, to a bastard molesting

girls; that witness had seen defendant taking up contributions for his legal defense.

On *cross-examination*, witness stated that he had heard defendant hundreds of times; that defendant was questioned why he spoke of America so much and he stated that he wanted to make America more perfect; that defendant referred to the white race as kicking the Negro race around; that defendant condemned lynching and stated that it should be abolished; that Shapiro, when charged with a moral offense, laughed and stated that he had paid his debt; that witness knows Langlois and Langen; that witness has on three occasions seen defendant taken by the police to [fol. 11] the park office and then seen him return and continue speaking.

Officer *Cunningham* testified that he had heard defendant refer to Marines as being foolish and flag wavers.

On *cross-examination*, witness stated that he had heard defendant some twenty times; that uniformed men had asked defendant questions; that they planned to dump defendant into the fountain but Officer Cunningham advised against it; that defendant criticized incompetence, social discrimination, the police department,—stating that the majority of the police were honest, a few dishonest; that the courts were crooked; that defendant would not be given a fair trial; that defendant could legally accept contributions; that witness never heard defendant advocate the forcible overthrow of the government.

Officer *Poole* testified that he had often heard Edelman speak; that he had seen him twice solicit funds for himself.

On *cross-examination*, Poole stated that he had heard defendant speak thirty or forty times; that he was not interested in what defendant said; that in answering the military, defendant stated that soldiers should proudly wear their uniform and do their duties as soldiers; that he never heard the defendant advocate the forcible overthrow of government; that defendant stated that force and violence were not necessary; that education should be directed properly to effect a peaceful change; that witness had never arrested anyone for soliciting contributions; that he had heard of defendant's arrest on the charge of malicious mischief, of-

fensive conduct and defacing of property, in connection with his standing on a park bench made of thick concrete; that witness had never heard defendant make any statement about the Pope's harem or refer to religion or sex; that defendant's talks dealt with his trials; that people in the audience would ask questions and defendant would become incensed and level a tirade against the questioners; that uniformed officers would remove the hecklers, taking defendant along.

[fol. 12] Officer *Moore* testified that he often heard defendant speak in Pershing Square; that witness would take away disturbers and hecklers; that witness had never heard defendant call anyone any names; that defendant did refer to groups as fools, idiots and liars.

On *cross-examination*, witness stated that on October 13, 1949, he arrested defendant as vagrant-idle-dissolute (P. C. 647.5); that defendant told witness that he was a writer; that he never heard defendant make any illegal statement about the government; that there was often heckling at defendant's meetings; that witness never heard defendant make any statement against religion or against the Pope; that defendant made work difficult for him.

Officer *Goldman* testified that he had often heard defendant speak in Pershing Square; that he referred to people as 400% Americans, as hoodlums and thugs.

On *cross-examination* witness stated that the 400% American reference was directed to a particular person who had asked about free enterprise; that he referred to him as damn fool or capitalistic slave; that witness had asked the crowd on occasions if defendant caused a disturbance and the people would answer "No"; that witness had seen a person with a red flag in the park; that he had never seen anything illegal said or done by defendant, and he had never heard defendant say anything insulting to his audience or to persons in uniform.

Saul Shapiro testified that he had been convicted of extortion in 1936 and served 3½ years; that he has heard defendant charge him with having been convicted of a morals charge involving little girls; that he had never been involved in or otherwise accused of any such offense or any offense relating to sex.

On cross-examination, Shapiro testified that he would ask

questions of defendant but that he never heckled; that he had given what he considered provocation to defendant for mak- [fol. 13] ing charges against him; that he had been told on occasions by persons in the audience not to annoy the speaker; that defendant did not have a constructive program; that defendant referred to his book, "The Myth of the Iron Curtain," and advocated Marxism; that defendant advocated violent overthrow of the government; that uniformed men proposed throwing defendant into the fountain but witness opposed this; that witness is emotional due to diabetes; that defendant stated that juries and courts are prejudiced; that witness warned defendant repeatedly and publicly not to make the statements about the witness which the defendant continued to do; that defendant advocated force and violence but that witness never told the police or other law enforcing officers about defendant's advocacy of force and violence; that defendant advocated production for use instead of for profit; that defendant distributed pamphlets; that defendant would hold on to the pamphlet until he got a contribution; that witness never struck defendant but did push him.

The prosecution rested.

Defense

Patrick Joseph McCarthy testified for defendant that witness was a sergeant in the air force, in uniform; that witness heard defendant speak on about twelve occasions; that witness had been present when other uniformed men were present; that witness never heard defendant use such expressions as liar, thief, etc., towards members of his audience; that witness never heard defendant make any statement derogatory of the uniform, but on the contrary, when drunk or noisy Marines tried to break up defendant's meetings, defendant stated that they were discrediting their uniform; that defendant spoke on such questions as unemployment and housing; that defendant never used offensive language towards those listening to him.

No cross-examination.

[fol. 14] *Mrs. Cora Sloman* stated that she had seen hoodlums in Pershing Square follow defendant from place to place and prevent his speaking; that she observed continuous heckling of defendant and deliberate abuse of defendant

by hecklers; that she never heard defendant use abusive language or call anyone liar, bastard, stool pigeon, thief, rowdy, punk, bum, dog, fascist bastard, or outcast Jew, or about the Pope having a harem; that when defendant speaks he draws a crowd to him; that defendant was always a gentleman.

Mrs. Helen Halex stated that she was a frequent visitor at Pershing Square; that she never heard defendant calling names, advising force and violence, speak against religion, refer to the Pope's harem, or say anything out of line with reference to sex; that defendant was continually heckled in the presence of the police who refused to maintain order; that defendant's reputation as a law-abiding citizen was good.

On *cross-examination*, witness stated that she heard people speak very highly of defendant; that the heckling of defendant began about a year ago.

W. B. Solons testified that he was a newspaper and public relations man, 83 years old, now not employed; that he had heard defendant speak at Pershing Square 250 to 275 times; that he had heard Langlois, Lamb, Brooks and others heckle defendant; that the hecklers are organized; that they use disreputable language towards defendant, such as dirty stinking S.O.B. and beggar; that the police would be present at such times but that they stopped the heckling not more than 1/20th of the times that it happened; that defendant spoke on political, economic, scientific and racial problems; that defendant stated that this country was the best in the world but could be better; that the government should do more with reference to housing and unemployment; that with regards to religion defendant stated that every person had a right to his own belief; that he never heard defendant [fol. 15] make any reference to the Pope's harem; that he criticized the poll-tax in the South and pointed to the threat made that a voting Negro is a dead Negro; that Shapiro was the loudest of the gang of defendant's hecklers; that Shapiro called Edelman such names as son of bitch; that Shapiro associated with Langlois, Brooks and the religious fakers; that when defendant would move to another part of the park to speak, Shapiro would follow him and heckle at the top of his voice, calling defendant skunk, panhandler, jailbird, etc.; that police would be present but would not pro-

tect defendant's meetings; that defendant told the military in the uniform, when they heckled him, that they should have more respect for their uniform; that witness never heard defendant use disparaging language towards his audience or towards men in uniform; that he saw Langlois screaming and heckling 25 or 30 times and saw Brooks and others holding a red flag and disrupting defendant's meeting; that defendant's reputation as a law-abiding citizen was very good.

On *cross-examination*, witness stated that he had heard many of Edelman's speeches from beginning to end; that he spoke of unemployment, foreign policy, etc.

Officer *Olsen* testified that he had listened to defendant in Pershing Square some 800 times but never paid any attention to his speeches; that witness was asked by persons in the audience why he did not protect defendant, to which he answered that if defendant needed police protection he should not be in Pershing Square. Witness stated that he failed to note the results of a poll defendant conducted in his presence while addressing an audience, to determine how many opposed his speaking; witness stated that someone was buzzing in his ear while the poll was being taken.

No cross-examination.

Officer *Covelli* stated that he did not recall his statement [fol. 16] to the manager of an eating establishment to the effect that "While you and I are talking, there's a Commie being ducked in the Pershing Square fountain."

On *cross-examination*, he stated that he had arrested defendant on a begging charge on a citizen's complaint on September 14, 1949, and that defendant had been convicted thereon; that he had seen defendant speak 10 or 12 times per night for 18 months.

One *Shockley* testified that he had heard Edelman about 25 times; that he could not recall what he said because he tried to forget what he said; that he said nothing against the government that he could recall. (Shockley had been subpoenaed by defendant, but because called by the prosecution, there was no occasion for further questioning by defense.)

Sidney Epstein testified that he had heard defendant speak hundreds of times; that recently witness has been intimidated by the police from going into Pershing Square

because of the police tactics of persecutions and arrests; that witness never heard defendant use inappropriate language or use such expressions as liar, bastard, thief, rowdies in uniform, or make reference to the Pope's harem; that defendant showed courtesy towards uniform; that defendant did not refer to the military as punks, bums, dogs, fascist bastards or the like; that defendant advocated ballots instead of bullets as means of change; that there is an organized heckling of defendant by Lamb, Langlois, Shapiro and a few others; that Hans Heumann spoke frequently in the park in the presence of the police; that the police did not, except very occasionally, interfere with the heckling of defendant; that witness saw defendant dumped into the fountain by a bunch of sailors and Marines.

On *cross-examination*, witness stated that he never saw viciousness as displayed by those who threw defendant into the fountain; that the persons involved operated with signs [fol. 17] as in a football game.

Ralph Mathews testified that he had heard defendant speak in Pershing Square at least 100 times; that defendant gave philosophical talks on religion, economics, good government, housing, unemployment, the vice of lynching, security for the individual from the cradle to the grave; that witness did not agree with some of the statements that defendant made; that defendant's speeches were constructive and educational; that on Saturdays and Sundays the fascist element took over Pershing Square; that Langlois, Lamb and Shapiro were regular and leading hecklers; that these hecklers violated every principle of Americanism.

On *cross-examination* witness stated that the people disapproved of the heckling.

Officer *Sam Posner* stated that he had patrolled Pershing Square for six months and generally saw defendant there; that in Pershing Square there are generally two uniformed police officers, always one, and generally two plain clothes men.

Sergeant *Evans* of the police department testified that he supervised the patrolmen of Pershing Square from June 1947 to October 1949; that he heard defendant two or three times a week over a period of a year; that he would have arrested defendant if he had violated the law; that he had

read the Communist Manifesto and disapproved of Marxian theories.

Boyd Taylor testified that he has been chief deputy, criminal division, city attorney's office, for five years; that his office processes 50,000 misdemeanors per month; that there are many repeat drunks and many vehicle code repeats, but such law violations as vehicle code repeats are never charged with vagrancy because of repeated violations of the law, because these offenses do not involve moral turpitude or lax morals; that his office handles several thousand violations of ordinances dealing with dirty restaurants [fol. 18] monthly, but such persons are never charged with vagrancy.

On *cross-examination*, Mr. Taylor stated that gamblers, panhandlers, drunks, prostitutes, etc. are charged with vagrancy.

John A. Woodward testified that he had heard defendant 500 to 600 times; that for a time he himself had heckled defendant; that the hecklers broke up defendant's meetings; that witness had never heard defendant use such expressions as liar, thief, etc. towards anyone in his audience; that defendant spoke about unemployment, etc.; that defendant never advocated force and violence; that on October 25, 1949, he saw Langlois shouting at defendant's meeting and threatening defendant, and Ramsey assaulting him physically; that Officer Moore asked the witness to testify that Edelman called Ramsey "stool pigeon" in connection with the incident in which Ramsey assaulted Edelman; that witness refused to offer false testimony; that officer Moore later arrested him for vagrancy.

On *cross-examination*, witness stated that he had been convicted of a felony; that officer Moore in the presence of plain clothes man stated to witness that witness used to be a good heckler, that he should co-operate with police; that he refused to give the false testimony requested; that he was arrested for vagrancy, pleaded guilty with an explanation, and received a five day suspended sentence.

On *re-direct*, witness stated that he had been convicted of a felony in Virginia and had paid the penalty.

Mr. Hurlburt testified that he was a dental technician; that he had listened to defendant for about a year; that defendant's meeting were heckled but that the police never

interfered; that witness never heard defendant use improper language towards his audience; that defendant never disparaged the military uniform, but on the contrary had told the men that they should respect the uniform; that defendant spoke on unemployment, housing, etc.; that de- [fol. 19] fendant on one occasion attempted to give out handbills on the sidewalk outside Pershing Square and asked the officer standing near him if that was allowed; that defendant was told "Try and see"; that thereafter defendant was taken down to the Park office; that when witness followed into the park office and inquired as to the charge, he himself was put under arrest. Witness testified that hecklers would put their hands to their mouths and bray and break up defendant's meetings and shout: "Edelman must go, we do not want him."

No cross-examination.

Rissell stated that he witnessed persons displaying red flag in Pershing Square, 4 or 5 feet from where defendant was speaking, and calling out: "Communist rats like Edelman want to bring communism to America"; that Langlois was in the group; that when defendant would move to another part of the park these hecklers with the flag would follow and break up his meeting; that he saw one of the group strike the defendant.

On *cross-examination* witness stated that a small group of people in the park were working with the police to make charges against the defendant; that one of these persons who had signed a disturbing the peace complaint against defendant had assaulted defendant physically when defendant was addressing his audience.

Herman Lane testified that he was a real estate and insurance man; that defendant lived with him; that he had a good reputation and a good character; that witness often heard defendant in the Park; that defendant never advocated force or violence or used improper language towards his audience; that witness saw a group of persons heckle defendant about 90% of the times that defendant spoke, and in the presence of the police; that some of these hecklers carried a red flag; that witness called police officer Moore's attention to this but Moore did nothing; that Hans Heumann spoke in Pershing Square for months in the presence of the police.

[fol. 20] *Nier O. Jacobson* testified that he is an artist; that he has known defendant over a year; that defendant's reputation is good; that he heard defendant speak 100 times or more in Pershing Square; that he disagreed with defendant's politics, thought him sincere but misguided; that he never heard defendant use abusive language toward his audience; that defendant criticized fascist police tactics in Pershing Square; that defendant was often heckled by the same group in the presence of the police who would do nothing.

No cross-examination.

Defendant, *Edelman,* testified that he was 50 years of age; that he was expelled from the Communist Party in 1947; that he had never been arrested in his life except for the current arrests in Pershing Square; that he had been arrested 13 times followed by bookings, and some 50 times when he was not booked but taken into custody in Pershing Square and released; that the *first* criminal complaint against him was August 30, 1948, for selling his pamphlet without license. The jury disagreed and the case was dismissed. The *second* complaint, September, 1948, was for begging and arose out of his efforts to obtain funds for his defense in case No. 1. Convicted; certiorari denied October 10, 1949. *Third:* January, 1949; charged with malicious mischief, offensive conduct and defacing property in connection with his standing on a very thick cement bench. Case thrown out by court. *Fourth:* February, 1949; charged with begging; arrest and complaint arose out of his efforts to obtain funds for defense in case No. 3. Certiorari denied November 29, 1949. *Fifth:* about March, 1949; complaint was begging; convicted; on appeal. *Seventh:* booked on three charges—selling, begging, and distributing of literature per se; count one and three dropped; conviction on count 2 upheld by Appellate Department of the Superior Court. *Eighth:* August 12, 1949, for distributing literature; ordinance declared unconstitutional. *Ninth:* August [fol. 21] 18, 1949; charge, handbill distribution and begging; begging count dismissed; handbill ordinance declared unconstitutional. *Tenth:* September 22, 1949; charge, vagrancy-dissolute (Citizen's arrest—Langlois—present case). *Eleventh:* Arrest, October 13, 1949; charge by Offi-

cer Moore—Vagrancy-dissolute. *Twelfth:* arrested on charge of disturbing the peace. *Thirteenth:* Charge of slander.

Defendant testified to numerous arrests not followed by complaints. On the very first occasion he had been taken to the park office, handcuffed, searched, taken to Central Station and released after being held there for an hour in handcuffs. On the occasion of his first arrest he was told to "Lay off the police and the police will lay off you"; that on at least 12 occasions he had been taken to the park office, questioned, searched and released.

Defendant testified as to the general content of his speeches in Pershing Square. That with reference to religion, on a number of occasions he debated against a speaker named Mr. Arnold who avowed himself an atheist, who denied God because, as he saw it, the gods through the ages have been used to enslave man; that in these debates the defendant took the position that it was highly unlikely that the cosmic forces which had given rise to sentiment and thinking man were devoid of the intellectual and the moral; that such intellectual and moral force operative in the universe would be infinitely more pleased with a Mr. Arnold who denied God because he loved mankind, than with the religious hypocrites and Philistines who mumbled words of flattery to God and oppressed their fellow man. Defendant stated that in his speeches he unqualifiedly rejected the theory of a god infuriated by the loss of an apple, a god who wanted men to be ignorant of good and evil, a god who observed from on high how his only son was being nailed to a cross; that he rejected the theory of a vain, capricious and jealous god who needed prayer, worship and tribute through middle-men such as priests or rabbis; but that he had a deep conviction that there was meaning to [fol. 22] human existence and human progress; that the desire to find fulfillment in that meaning was a far more genuine religious sentiment than the cajoling of a Diety to obtain personal reward of celestial bliss.

Defendant categorically denied the statement attributed to him about the papal harem. In his criticism of prevailing religious ideas, defendant stated that he always made it clear that he saw no important distinctions between the

various priests, ministers or rabbis, all claiming to possess exclusive key to Heaven and access to God; that he had no notion of a papal harem and viewed statements of this sort as slanderous, incorrect and ineffective; that the statement as far as he was concerned was concocted out of whole cloth.

With reference to the wine bath-tub incident, defendant testified that he indeed had mentioned it on a few occasions; that he conjoined it with the *Leob*-Leopold case to illustrate the maladjudgment and frustration existing at all levels of present day society, where at the lower level there is a brutalizing, frustrating struggle for existence, or crumbs of bread, while at the upper level there is a mad scramble for bars of gold; that Leob and Leopold, the two young sons of millionaires who had exhausted every thrill money could buy and sought for thrill in murder of a cousin, and the exclusive Earl Carroll set which sought for thrill in the wine bathing a nude beauty; that these two cases strikingly illustrated the intellectual and moral bankruptcy of our social order and the need for a new social order where human beings can find a human meaning in life, rather than waste their lives in frantic search of bread, gold or unnatural and empty thrills. Defendant stated that in his account he made no use of lurid details and that the testimony of "woman's juices" was the product of sex-starved imagination or intentionally concocted for effect.

Apropos of the use of the term "prostitute," defendant [fol. 23] stated that he made use of it in his speeches not only with respect to pen and intellectual prostitutes but also with reference to sex. Defendant in his speeches dealt with monetary relations as corrupting factor in sex and family relations; with the money element corroding parent-children, husband-wife and boy-girl relations; and with the legalized and sanctified prostitution involved in the marriages between wealth and beauty. Defendant stated that his espousal of the socialist way of life stemmed in part from his conviction that it will usher in a social climate in which men and women will live together only because love binds them, not because of sordid calculations; that our many divorces today were an inevitable outcome of the monetary basis underlying most marriages; that where love would be the sole cementing factor, unions would tend to be more stable and people happier.

With references to the allegation that he had advocated Marxian doctrines in his speeches, defendant testified that he had, indeed, often discussed the fact that the implements with which man produces the things required for his material existence had enormously grown within the past century; that the stage coach had developed into the railroad and other systems of modern transportation and communication; that the village blacksmith had evolved into the gigantic steel, iron, copper and aluminum combines; that small scale had given way to large scale production and distribution and that society will sooner or later be compelled to draw its conclusion from this profound transformation and effect the change from private ownership for private profit to social ownership for the general good. In this connection, defendant pointed out that revolutionary social upheavals do not arise because of the preachments of agitators and propagandists but rather that the need within society for a profound transformation tends to call into being the spokesmen to voice the need; that, hence, the persecution or suppression of agitators offers no solution; [fol. 24] the present social order, to continue, will have to cope with the problems of jobs, homes, health, racial relations and peace, not with the agitators who direct attention to the symptoms of decay. These, in substance, were some of the Marxian ideas defendant presented to his audiences.

Defendant testified that he had never advocated force and violence as a method whereby a minority was to dislodge the majority and seize power; that, indeed, he considered it preposterous to conceive that a minority, be it of 49%, could hope to wrest power from 51% who had on their side not only the advantage of numbers but also the control of state power, telephone and telegraph communication, press and radio, etc. Defendant saw force and violence as feasible only where the proponents of social change were in an overwhelming majority and those favoring the status quo were in a small minority determined to hold on by force. In such situation defendant held that force and violence to dislodge the minority would be legally and morally as valid as the force and violence which was used to dislodge the forces of King George in 1776 and the forces of the slave owners in the 1860s; that such force and violence was, in-

deed, implicitly and explicitly sanctioned by the Declaration of Independence and the preamble to our Federal Constitution.

Defendant testified to having criticized our racial relations, to having stated in his speeches that, indeed, our national defense dictated the abolition of Jim Crow and the establishment in practice of the principle that all men are created equal and endowed by their Creator with the inalienable right to life, liberty and the pursuit of happiness; that our preachment of democracy and other virtues to other nations had a hollow ring in the light of our practice, in the light of our treatment of the Negro people and the national minorities; that such practice tended to estrange and isolate us from most of the peoples of the world.

Defendant denied having characterized our present gov-
[fol. 25] ernment as fascist. He testified that in his talks he always made it clear that fascism was the dictatorship of Big Business, involving the abolition of democratic rights and the destruction of the trade union movement. Defendant stated that in dealing with this question he always pointed out that there was an important distinction between capitalism in its democratic form and capitalism in its fascist form; that there was a qualitative distinction between fascist capitalism in Spain, near-fascist capitalism in our state of Mississippi, and the more or less democratic forms capitalism assumed in our North and in England, France or Sweden.

Defendant stated that the prosecution witnesses had distorted his criticism of the law enforcement machinery; that he did not take the shallow position that all cops, judges and juries were no good; that in his speeches he rather pointed out the fact that in a capitalist society the laws were capitalist in nature and expressed the will and the interests of the capitalist property owners; that that was why the law was blissfully unconcerned when a man was starving but swiftly sprang into action the moment he stole a loaf of bread; that, moreover, in the enforcement of the law, in the matter of bail, of the obtaining of a competent lawyer, the opportunity to carefully scrutinize a jury panel, or conduct a search for relevant data, in the obtaining of a transcript of a trial record in the case of appeal—in all these matters the owners of wealth had a distinct advantage.

Defendant testified that the heckling and hoodlumism in Pershing Square was organized; that Richard Lamb was the "master-mind" back of it; that it stemmed from Richard Lamb's desire to promote an *American Homestead Association,* an organization of which Richard Lamb was director and Bernard Langlois a dummy president, with Miriam Lamb, secretary-treasurer; that the ostensible purpose of the organization was to educate the public in the [fol. 26] merits of a "Lamb Bill" to be submitted to the California Legislature sometime in March 1950, but that the obvious purpose was to siphon money from Pershing Square and elsewhere to the secretary-treasurer in Pomona, California; that the heckling and hoodlumism with police cooperation, began in earnest after Richard Lamb delivered a speech in which he claimed that he had taken verbatim notes of left wing speakers in Pershing Square and that they advocated the overthrow of the government by force and violence. Defendant replied to that speech, suggesting that before Lamb made such serious charges he should first establish his own integrity by rendering a much requested account of moneys entrusted to him some months earlier in his capacity of president of a Civic Betterment Committee, an organization he had formed and forsaken penniless; that after defendant made that statement, hell broke loose in Pershing Square as relations tightened between Richard Lamb, Bernard Langlois, the police and the City Attorney's office by way of conferences to "get Edelman"; that Langlois publicly bragged that City Attorney Nielsen told him that Edelman's activities in Pershing Square would soon fold; that when defendant publicly complained that the chummy relations between the law and the lawless were a step in the direction of fascism, there followed eight arrests on various charges in swift succession.

With respect to the alleged collusion of law enforcement agencies with alleged disreputable characters, defendant stated that on the occasion when he was ducked into the fountain by a group of sailors and marines, Officer Covelli appeared on the scene with a contented smirk a half minute after the uniformed lads ran off; that on another occasion when a sailor assaulted defendant, police were most reluctant to arrest and book assailant and the City Attorney's

office never made the least effort to prosecute the case. With respect to police discriminatory attitude, defendant claimed that the first time he was arrested, bail set in his case was [fol. 27] 20 times that set ordinarily for selling without a license; that in the instant case the police originally set bail 5 times the amount which was set in the case of Hans Heumann several weeks earlier on an identical charge.

With reference to Richard Lamb's testimony that defendant "associated" with Hans Heumann who had been convicted of being a dissolute person several weeks prior to the instant trial, defendant testified that for many months during which said Hans Heumann addressed meetings in Pershing Square, defendant did not suspect his homosexual inclinations. The police, as his trial revealed, had his record. But Hans Heumann and the police in Pershing Square got along beautifully while Hans Heumann heckled Edelman's meetings and otherwise opposed him. Police relations with Heumann deteriorated only when Heumann developed political tolerance, when he began to take the position publicly that Edelman had the right of free speech even though he, Heumann, disagreed with him; that his arrest followed by a few days Heumann's publicly expressed intention to conduct a picketing of the jail if Edelman was arrested for exercising his constitutional right to distribute literature. Defendant stated that his "association" with Hans Heumann never went beyond those of political opponents who had composed their differences.

Defendant testified that his charges against Shapiro were provoked by the latter's persistent breaking up of defendant's meetings; that general information had it that Shapiro was a former convict at San Quentin, at some time involved in a morals charge—charges Shapiro never denied; that Shapiro publicly stated that he would protect the naive people of Pershing Square from Edelman's subversion; that defendant on numerous occasions invited Shapiro to discuss issues instead of making noise; that Shapiro always refused the offer; that defendant, in consequence, on a number of occasions stated that a guardian of community [fol. 28] morals had to bring credentials more substantial than sojourn in San Quentin and involvement in a morals charge.

Defendant testified that it was not the people objected to his speaking but a handful of hecklers, organized, and encouraged by police collusion; that on a number of occasions he polled his audience asking how many objected to his speaking and that objectors invariably were an insignificant minority; that in October, 1949, he conducted such a poll in the presence of Officer Olsen, and out of a crowd of several hundred there were but four objectors. Defendant testified to Brooks holding a red flag just behind him while he was speaking, thus inciting the public to violence against him, all this in presence of police and without police interference with this outright provocation.

Witness stated that he was not a reckless flouter of the law; that for a year and a half, until August 1949, his literature distribution for contributions, conducted in the presence of the police, was not interfered with; that the two convictions prior to that date resulted in connection with his efforts to obtain funds for his legal defense, accompanied at the time by no literature distribution; that after his second arrest in connection with literature distribution for contributions, in August 1949, he informed his audiences that he would accept no more contributions pending determination of the law by the courts; that he had discontinued accepting contributions months before his first conviction was finally validated by United States Supreme Court denial of certiorari.

On *cross examination*, witness testified that his criticism of the leadership of the Communist Party was chiefly on the grounds of shallowness, incompetence and lack of democratic practice within the Party; that the differences involved no basic disagreement on policy or principle; that he agreed with Communist Party position on housing, on the need for full employment, improved racial relations, [fol. 29] socialized medicine, academic freedom, and the desirability of ending the cold war.

Witness stated that he assumed that the charges he made against Shapiro were true when the latter failed to deny them; that with respect to the subpoenas, he issued them with bona fide intention on the theory that witnesses would fear to perjure themselves and that the truth ob-

tained from the mouth of an opponent was all the more convincing.

On re-direct, witness stated that as of the day of his testifying, November 5, 1949, but one judgment against him had become final.

Rebuttal

Langlois testified that defendant gave John Doe subpoena to Madero and an unidentified Moscowitz.

On *cross-examination*, he stated that he phoned the city attorney's office and was told that these subpoenas were no good; that the police had told him that the Moscowitz subpoena was no good; that he had told Moscowitz to disregard the subpoena. Witness also stated that he had defendant's friends "a mile long" arrested through the bunco squad.

Surrebuttal

Defendant testified that he gave only one John Doe subpoena to Madero; that he assumed Madero would have to testify in court truthfully; that defendant thought it worth while to establish in court that Madero and Langlois together had been engaged in breaking up defendant's meetings even while the trial was going on with Langlois as plaintiff; that defendant's attorney has since explained to defendant that a person calling a witness vouches for his credibility; that the so-called Moscowitz John Doe subpoena was sheer fabrication, that this Moscowitz was [fol. 30] most likely a fictional character.

After the jury brought in its verdict on the 7th of November, date for sentencing was set for November 14, 1949. On that date, continuance was granted. Another continuance was later granted to December 12, 1949.

On December 12, 1949, witness Richard Lamb was called to the witness stand at defendant's request and stated that he had been a WPA teacher, using Texas University facilities; that he had taken courses at Columbia University; that he held an A.B. degree; that he declined to state from what institution he had an A.B. degree on the ground that it might tend to incriminate him.

A motion for a new trial was made and denied, and the defendant was sentenced to 90 days in the City Jail.

The trial judge has caused to be prepared Reporter's Transcript of a part of the proceedings, as follows; Instructions to Jury and proceedings on Motion to Quash Subpoena Duces Tecum, which are herewith transmitted and made a part of this record on appeal.

Grounds of Appeal

1. The court committed error in excluding evidence on discriminatory enforcement.
2. The court erred in rulings with reference to the admission and exclusion of evidence.
3. The court erred in its instructions to the jury, and in its failure to give instructions.
4. The evidence was insufficient to sustain the verdict or judgment.
5. Vagrancy statute is unconstitutional because vague and indefinite.
6. The court erred in denying defendant's motion for a [fol. 31] new trial.

The above statement on appeal is hereby engrossed as containing all the evidence necessary to the determination of this appeal, and the same is now allowed and settled as the engrossed statement on appeal in the above entitled action.

Dated this 18 day of June, 1951.

Walters, Judge.

[fol. 32] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fol. 33] IN MUNICIPAL COURT, CITY OF LOS ANGELES

DOCKET ENTRIES

[Title omitted]

Sep. 23, 1949

$25.00 Cash Bail posted #48172-N.

Sep. 23, 1949

Complaint filed charging Defendant with having in the City of Los Angeles, County of Los Angeles, committed a misdemeanor, to wit:

Violation Subsection 5, Section 647, Penal Code—Vagrancy.

Judge K. A. White presiding.

Defendant in Court duly arraigned. Informed of all his Legal Rights. Defendant enters plea of not guilty of the offense charged.

Defendant and Counsel personally demand jury trial. Transferred to Division 7 for trial, October 11, 1949 at 9:30 A. M.

Bail set at $25.00.

Defendant committed.

Oct. 10, 1949

Judge Schweitzer presiding. People represented by Manley. Defendant represented by Gallagher.

Continued for trial to October 19, 1949 at 9:30 A. M.

Defendant personally waives statutory time for trial.

Oct. 19, 1949

Judge Schweitzer presiding. People represented by W. J. Manley. Defendant represented by L. Gallagher.

Transferred to Division 15 for trial.

Oct. 19, 1949

In the following case Teplitz Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both par-

ties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Cause continued for trial to October 24, 1949 at 2 P. M.

Oct: 24, 1949

In the following case Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Cause continued for trial to October 25, 1949 at 10 A. M.

Oct. 25, 1949

In the following case Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

[fol. 34] Oct. 26, 1949

Cause continued for trial to October 26, 1949 at 10 A. M.

In the following case Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Recessed to 2 P. M.

At 2 P. M. Cause called. All parties present.

The following Jurors were sworn, examined and accepted:

1. Mrs. Norma J. Reardon.
2. Mrs. Ida Mae Hutchason.
3. Harold W. Knoll.
4. Mrs. Isabelle W. Moyer.
5. Mrs. Clara Hannifin.
6. Mrs. Adeline Robert.

7. Mrs. Lula H. Warren.
8. Mrs. Frances L. Kurtz.
9. Miss Florence M. Francis.
10. Mrs. Etta K. Morgan.
11. Mrs. Ellen A. Cook.
12. Mrs. Lucille C. Case.

Jury sworn to try cause.

The following witnesses were sworn and examined for People:

Frederick Boyd.

Cause continued for trial to October 27, 1949 at 10 A. M. Jury admonished.

Oct. 27, 1949

Affidavit for Subpoena Duces Tecum filed.

Oct. 27, 1949

In the following case C. A. Tallman Reporter is ordered to take down proceddings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Stipulated all Jurors present.

The following witnesses were sworn and examined for Defendant: Edward Walker.

The following witnesses were sworn and examined for People: Frederick Boyd—recalled.

Recess to 2 P. M.

Jury admonished.

At 2 P. M. Cause called. All Jurors and parties present. [fol. 35] The following witnesses were sworn and examined for People: William B. Shockley.

People's Exhibit "A": Subpoena filed.

Defendant's Exhibit "2": Calendar filed.

D. A. Madero.

People's Exhibit "B": Subpoena filed.

Defendant's Exhibit "3": Memorandum for identification. Exhibit "4": Memorandum for identification.

Richard Lamb.

Cause continued for trial to October 28, 1949 at 10 A. M. Jury admonished.

Oct. 28, 1949

In the following case C. A. Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Stipulated all Jurors present.

The following witnesses were sworn and examined for People: Richard Lamb—recalled.

C. P. Ahern.

Recess to 2 P. M.

At 2 P. M. Cause called.

Stipulate all Jurors and parties present.

Motion of People to quash an affidavit and Subpoena Duces Tecum issued by Defendant directed to Police Department requesting certain records granted.

The following witnesses were sworn and examined for People: Richard Lamb—recalled.

Cause continued for trial to October 31, 1949 at 10 A. M. Jury admonished.

Oct. 31, 1949

In the following case C. A. Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

[fol. 36] Stipulated that all Jurors present.

The following witnesses were sworn and examined for People: Bernard Langlois.

The following witnesses were sworn and examined for Defendant: Patrick McCarthy.

The following witnesses were sworn and examined for People: Michael Langen.

Recess to 2 P. M.

Jury admonished.

At 2 P. M. cause called.

Stipulated all Jurors and parties present.

The following witnesses were sworn and examined for People: William Odom, D. C. Cunningham, Chester Poole, Donald Moore, Sid Goldman.

People rest.

The following witnesses were sworn and examined for Defendant: Cora Sloaman, Helen Halex, W. R. Solons.

Cause continued for trial to November 1, 1949 at 10 A. M.

Jury admonished.

Nov. 1, 1949

In the following case C. A. Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher and J. B. Tietz.

Stipulated all Jurors present.

Case reopened by People.

The following witnesses were sworn and examined for People: Sol Shapiro.

Recessed to 2 P. M.

Jury admonished.

[fol. 37] At 2 P. M. cause called. All Jurors and parties present.

The following witnesses were sworn and examined for Defendant: Richard Olen, Nick Covelli, W. R. Solons —recalled. William Shockley, Sidney Epstein, Ralph Matthews.

Cause continued for trial to November 2, 1949 at 10 A. M.

Jury admonished.

Nov. 2, 1949

In the following case C. A. Tallman, Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher and J. B. Tietz.

Stipulated all Jurors present.

The following witnesses were sworn and examined for Defendant: Sam Posner, Charles J. Evans, Boyd Taylor, J. A. Woodard.

Recess to 2 P.M.

Jury admonished.

At 2 P.M. cause called.

Stipulate all Jurors and parties present.

The following witnesses were sworn and examined for Defendant: C. R. Hulbert, Charlie Risdell, Herman Lane, Isidore Edelman, W. O. Jacobson.

Cause continued for trial to November 3, 1949 at 10 A.M.

Jury admonished.

Nov. 3, 1949

In the following case C. A. Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

[fol. 38] Stipulated all Jurors present.

The following witnesses were sworn and examined for Defendant: Isidore Edelman—recalled.

Recess to 2 P.M.

Jury admonished.

At 2 P. M. cause called. Stipulate all Jurors and parties present.

The following witnesses were sworn and examined for Defendant: Isidore Edelman—recalled.

Cause continued for trial to November 4, 1949 at 10:00 A.M.

Jury admonished.

November 4, 1949

In the following case C. A. Tallman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Stipulated that all Jurors present.

The following witnesses were sworn and examined for Defendant: Isidore Edelman—recalled.

Defendant's Exhibit "1": Dime and nickel filed.

Recess to 2 P.M.

Jury admonished.
At 2 P.M. cause called.
Stipulate all Jurors and parties present.

The following witnesses were sworn and examined for Defendant: Isidore Edelman—recall.

Leo Gallagher.
Defendant rests.
Rebuttal: Bernard Langley.
Sur-rebuttal: Isidore Edelman.
Defendant's Exhibit "3" and "4" offered for identification is ordered in evidence.

[fol. 39] At 5:30 P.M. jury sent to dinner in charge of bailiff H. L. Terry.
Cause recessed to 7 P.M. this date.
Jury admonished.
Jury returned.
At 7 P.M. cause called. All Jurors and parties present.
Cause argued.
People's Exhibit "B": John Doe Subpoena has been misplaced and cannot be filed.
Cause continued for trial to November 7, 1949 at 9:30 A.M.
Jury admonished.

Nov. 7, 1949

In the following case C. A. Tallman, Reporter, is ordered to take down proceedings as provided by law.
Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by R. Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.
Stipulated all Jurors present.
People's Exhibit "B": filed John Doe Subpoena.
People argue.
Jury instructed.
Instructions filed.
Jury retired this November 7, 1949 at 10:45 A. M. in charge of Bailiff H. L. Terry, duly sworn.

At this 12:30 P.M. jury taken to lunch.

At this 1:30 P.M. jury return into court and retire for further deliberations.

Jury returned into court at this 6:15 P.M.

Nov. 7, 1949

Parts of instructions read from record by reporter.

At this 8:45 P.M. jury return into court with the following verdict:

"We the jury in the above entitled cause, find the Defendant guilty of the offense charged.

Harold W. Knoll, Foreman."

Verdict filed.

[fol. 40] Continued for sentence to November 14, 1949 at 10 A.M.

Bail up to stand.

Nov. 14, 1949

In the following case E. Rasmussen, Reporter, is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by J. S. Fitzpatrick, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Defendant's motion for new trial.

Continued for sentence to November 21, 1949 at 10 A.M.

Bail up to stand.

Nov. 21 1949

Affidavit filed.

Nov. 21, 1949

In the following case Jean Sumner, Reporter, is ordered to take down proceedings as provided by law.

Cause called. Judge J. A. Shidler presiding. Both parties ready. People represented by Fitzpatrick, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Cause continued for sentence to November 28, 1949 at 10 A.M.

Defendant personally waives statutory time.

Bail up to stand.

Nov. 28, 1949

In the following case Jean Sumner, Reporter, is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. People not represented. Defendant in court and represented by Leo Gallagher.

Cause continued for sentence to December 12, 1949 at 10 A. M.

Defendant waives time of sentence.

Bail up to stand.

Dec. 12, 1949

In the following case F. L. Lee, Reporter, is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by R. Hayden, Deputy City Attorney. Defendant in court and represented by Leo Gallagher.

Richard Lamb sworn and examined by Defendant.

Defendant's motion for new trial denied.

[fol. 41] Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court this December 12, 1949 that for said offense of Violation of Vagrancy the said Isidore Edelman be imprisoned in the City Jail of Los Angeles City, for the term of 90 days and the said Defendant be discharged at the expiration of said term.

Sentence to run concurrent with case #048833.

Defendant committed.

Bail ordered exonerated.

Dec. 13, 1949

In the following case F. L. Lee, Reporter, is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. People represented by E. C. Rogers, Deputy City Attorney. Defendant not in court and not represented.

Notice of Appeal filed with receipt of P. E. Grey, Deputy City Attorney.

Bail set at $250.00.

Dec. 13, 1949

$250.00 Cash Appeal bail posted. Receipt #52932-N. Release issued.

Dec. 16, 1949

Affidavit and Order filed extending time to December 31, 1949 to file Statement on Appeal.

Dec. 29, 1949

In the following case W. A. Weigel, Reporter, is ordered to take down proceedings as provided by law.

Cause called. Judge Byron J. Walters presiding. Both parties ready. People represented by L. Nielsen, Deputy City Attorney. Defendant in court and represented by Fred Okrand.

Affidavit in Forma Pauperis in Support of Application for order for Reporter's Transcript filed.

Continued to 2 P.M.

At 2 P.M. all parties present.

Motion for order directing preparation of Reporter's Transcript without cost to Defendant.

Motion denied.

Dec. 30, 1949

Proposed Statement on Appeal filed with receipt of P. E. Grey, Deputy City Attorney.

Jan. 3, 1950

Affidavit and Order filed extending time to January 18, 1950 to file proposed Amendments to proposed Statement on Appeal.

[fol. 42]

Jan. 17, 1950

Affidavit and Order filed extending time to February 2, 1950 to file Proposed Amendments to Proposed Statement on Appeal.

Feb. 7, 1950

In the following case Wm. McKethan Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by Hayden, Deputy City Attorney. Defendant in court in Pro Per.

Substitution of Attorneys filed and granted.

Defendant's motion to submit new statement on Appeal to City Attorney granted.

Hearing in Division 15, April 18, 1950.

Bail up to stand.

Mar. 28, 1950

Proposed Statement on Appeal filed with receipt of Leland Nielsen, Deputy City Attorney.

Apr. 18, 1950

In the following case C. Lunsford Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by W. Manley, Deputy City Attorney. Defendant in court and represented by A. Wirin.

Hearing on Settlement of Statement of Appeal continued to April 19, 1950 at 10 A.M.

Apr. 19, 1950

In the following case C. Lunsford Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by W. J. Manley, Deputy City Attorney. Defendant represented by A. L. Wirin.

Hearing on Settlement of Statement of Appeal continued to April 20, 1950, at 10 A.M.

Apr. 20, 1950

In the following case C. Lunsford Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by W. J. Manley, Deputy City Attorney. Defendant in court and represented by A. L. Wirin.

Hearing on Settlement of Statement of Appeal continued to April 21, 1950 at 10 A.M.

Apr. 21, 1950

In the following case C. Lunsford Reporter is ordered to take down proceedings as provided by law.

[fol. 43] Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by W. J. Manley, Deputy City Attorney. Defendant in court and represented by A. L. Wirin.

Hearing on settlement of Statement on Appeal continued to April 25, 1950 at 10 A.M.

Apr. 25, 1950

In the following case G. Summers Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by R. Hayden, Deputy City Attorney. Defendant in court and represented by A. L. Wirin.

Defendant in court for hearing on Settlement of Statement of appeal. Continued to May 4, 1950 at 10 A.M.

May 1, 1950

Respondent's proposed amendments to Appellant's proposed statement filed with affidavit of service by mail.

May 4, 1950

In the following case C. E. Deming Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by R. Hayden, Deputy City Attorney. Defendant in court and represented by A. L. Wirin.

Hearing on Settlement of Statement of Appeal.

Argued and submitted.

Jun. 8, 1950

In the following case H. P. Fursdon Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. People represented by W. J. Manley, Deputy City Attorney.

Order to prepare part of transcript and for payment thereof filed.

Transcript of parts of above case ordered by Court, received and filed.

Jul. 7, 1950

In the following case P. A. Duran Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Byron J. Walters presiding. People represented by C. Branch, Deputy City Attorney. Defendant not in court and not represented.

Settlement of record on Appeal resubmitted and further argument ordered and set for August 15, 1950 at 10 A.M.

[fo 44] Aug. 15, 1950

Cause called. Judge Byron J. Walters presiding. People represented by C. Branch, Deputy City Attorney. Defendant not in Court and not represented.

Argument on Appeal continued to September 6, 1950 at 10 A.M.

Sep. 6, 1950

Cause called. Judge Byron J. Walters presiding. People represented by R. Hayden, Deputy City Attorney. Defendant not in Court but represented by A. L. Wirin.

Argument on Statement on Appeal submitted.

Nov. 6, 1950

Cause called. Judge Byron J. Walters presiding. People represented by R. Hayden, Deputy City Attorney. Defendant not in Court but represented by A. L. Wirin.

Defendant's Counsel to engross Statement on Appeal.

Jun. 18, 1951

Judge Byron J. Walters presiding.

Engrossed Statement on Appeal filed with Affidavit of service by Mail.

Engrossed Statement on Appeal allowed, settled, certified and signed.

By Eileen M. Roche, Deputy.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 45] [File endorsement omitted]

IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES
DIVISION NO. 15

[Title omitted]

Hon. Byron J. Walters, Judge

INSTRUCTIONS TO THE JURY—Filed June 8, 1950

Appearances:

For the People: Mr. Richard Hayden.
For the Defendant: Mr. Leo Gallagher.

[fol. 46] The Court: May it be stipulated, gentlemen, that the Court may instruct the jury orally?

Mr. Hayden: So stipulated.

Mr. Gallagher: So stipulated.

The Court: Members of the jury, you should perform your duty in this case uninfluenced by pity for the defendant, or by passion or prejudice against him on account of the nature of this charge. You are to be governed solely by the evidence introduced in the case, and the law as given to you by the Court. The law will not permit jurors to be governed by mere sentiment or conjecture, or sympathy, or passion, or prejudice, or public opinion, or public feeling. Both the People and the defendant have a right to expect that you will carefully and dispassionately weigh and consider the evidence and the law of the case, and give to your deliberations your conscientious judgment, and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The jury is the sole and exclusive judge of the effect and value of the evidence introduced in the trial. And by the same token, of the credibility of the witnesses who have testified in the case. Obviously, before you may determine the weight to be accorded the testimony of a witness, you must first determine whether he speaks the truth in whole or in part. A witness false in one part of his testimony may be considered by you—in this connection, that is, if a [fol. 47] witness testifies to an untruth, in your opinion, not

as a matter of inadvertence, but with a design to deceive—willful design to deceive—if you are so convinced of that, you may disregard his entire testimony. Unless you are convinced that, notwithstanding his base character, he has in other respects spoken the truth. But you may disregard it all, if you are so inclined.

Now, for the purpose of determining the credibility of the witnesses, you may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. That is what we determine in law, a rebuttable presumption, however, and it may be repelled in your mind by the manner in which he testified, his interest in the case, if any, or his bias or his prejudice, if any, against one or any of the parties by the character of his testimony. That is, the probability of it, or the improbability of it, or by the contradictory evidence of another witness or witnesses with whom you have greater faith.

You are not bound to believe any number of witnesses against a lesser number or a single witness when the testimony of the lesser number or single witness produces conviction in your mind. The test is not whether any particular number of witnesses, great or few, have testified to the existence of a certain state of facts, but the true test is [fol. 48] does the evidence produce either by a greater or lesser number of witnesses, or a single witness, produce conviction in your mind. Now, certain evidence has been introduced in the case concerning the character of the defendant in respect to those trajts of character which ordinarily would be involved in the commission of the crime charged in this case. That is, the character or reputation of the defendant as a law abiding person. Now, such evidence is regarded in law as relevant to the question of whether the defendant is innocent or guilty of the crime charged, because the jury may, if its judgment so directs, reason that it is improbable that a person of good character in such respects would have conducted himself as alleged. Character evidence of itself may be such to raise a reasonable doubt whether or not the defendant is guilty, which doubt otherwise would not exist. Hence, you must consider

such evidence in connection with all of the other evidence in the case.

But, if after weighing all of the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty of the crime charged against him in the complaint, your duty will be to find him guilty of that offense, notwithstanding the testimony that he was, or is, a person of good character.

Now, the defendant in this case, having elected to take the stand and testify voluntarily in his own behalf, is entitled [fol. 49] by law so to do. And he is entitled to have his testimony considered by you along with all of the other evidence in the case. You are to judge of the credibility of the defendant as a witness, for when he takes the stand he becomes a witness. You are to judge of his credibility by the same standards as you are to judge of the credibility of any other witness.

Some of these standards I have just related to you.

If any of counsel have during the course of the trial stated an opinion that the defendant is guilty or that he is innocent, or that a fact is or is not true, or that a witness has spoken the truth, or has spoken falsely, you are to consider such statement of counsel as an opinion only, with which you may or may not agree in accordance with your best judgment. Such an opinion of counsel is not binding upon you. Such statements of counsel are not evidence. They are obviously comments upon the evidence.

If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out entirely. You must also disregard any inference which you might be inclined to draw from a question which has remained unanswered by virtue of ruling of the court. The question of the admissibility of the evidence is a question of law, and is solely within the discretion of the trial judge, and the judgment of the trial judge, and not one for the [fol. 50] jury. However, please remember that in admitting evidence of any kind in the case, when an objection has been made, the trial judge does not pass upon the weight to be accorded it, but merely passes upon its admissibility and there remains yet for the jury to be the sole judge of the weight to be accorded it.

Now, if the judge of the court, by the ruling upon these questions of law during this trial, or by any remark or remarks, or by any mannerism or expression, has led any of the jurors to believe that the judge of the court thinks the defendant is guilty, or that the judge thinks the defendant is innocent, or that a witness has spoken the truth, or has spoken falsely, or that a fact does or does not exist, you are to remember that such belief, even if it does or did exist in the mind of the judge of the court, is only an opinion, which is not binding upon you in any particular, and you should not attempt to search it out. You should not permit yourself to be disturbed in your duty as the sole judges of the facts in this case.

Now, while the jury is the sole judge of the facts of the case, the trial judge is the judge of the law of the case. Whether you believe the law to be right or wrong, or whether or not you think the statement of the law now given you is correct or incorrect, or whether or not you think the interpretation of the law as now given you is correct or incorrect, you will have no quarrel with the statement or interpretation of the law, but for the purpose of this case [fol. 51] you must adopt the law as now stated to you, and under no circumstances will you permit yourselves to become the judges of the law, or its interpreters.

A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted. But the effect of this presumption of law is only to place upon the People of the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows:

It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible doubt or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Now, perhaps a remark should be made concerning these instructions by the trial judge at this point. It is our duty

to advise you as to the law of the case. Obviously, there are a number of points of law to be discussed. Obviously, they cannot be discussed instanter. They must follow in some kind of order. But you are not to draw any inference from the order in which they are given to you. No emphasis is meant to be placed on any instruction because it is given [fol. 52] first or last. Also, the judge of the court is permitted under our law to advert to the evidence. It is not the custom of this trial judge to comment upon the evidence under ordinary circumstances, but in the discussion of points of law, perhaps a sentence here or there may be construed to be, and it may be a comment upon the evidence. Now, you are instructed that if the court does comment upon the evidence, you are still the sole judges of its effect and its value, and the comment of the court upon the evidence is no more binding upon you than the comment of counsel that I have just referred to. You may agree with it, if you want to, and disregard it, if you want to.

Now, with respect to these instructions, also, it is the duty of the court to give you the law with respect to what the evidence has been. In other words, if there is no evidence on a particular point, then you wouldn't be instructed on that law. To use an example, suppose a person was charged with assault, and there was no evidence in the case whatsoever of any theory of self-defense, it would not be encumbent upon the court to instruct you as to the theory of self-defense, and what is necessary to set up a valid defense of self-defense. But I use that as an illustration to suggest to you that we must follow to a certain extent the evidence in the case. Now, the evidence in most cases, and in this case, is conflicting, and it will be your duty, if pos- [fol. 53] sible, to resolve that conflict. Now, the mere fact that the judge of the court instructs you as to certain law which, when you hear it, may strike a sympathetic note in that you will remember a bit of evidence that it might apply, now, that does not mean that the judge of the court thinks that that is true. That bit of evidence that you think of. But I merely give to you such instructions of law as might become necessary for you to have in case you make certain findings on the evidence. So that the mere fact that the court instructs you as to the law on which may apply to a

circumstance concerning which there is a conflict of evidence, that does not necessarily mean that the court thinks that that evidence is true. And even if the court did think that evidence was true, it would not make any difference in your deliberations.

Now, there has been some mention in this case and some evidence which was introduced undoubtedly to substantiate a defense of unequal enforcement of the law. You are advised in this regard that a law fair on its face is unconstitutional as it operates upon a particular defendant if it is applied and administered by public authority in a discrimnatory manner so as to make unjust and illegal discriminations between persons in similar circumstances material to their right. In this connection you are advised that in order for this defense of unequal enforcement to be raised—to be validly raised, it must be shown that the law enforcement agency involved has practiced a systematic [fol. 54] discrimination against the defendant, or persons of his class. It is not sufficient to show merely that other persons did the same thing as the defendant did went unpunished.

Now, the defendant is charged in this complaint with a violation of Subsection 5 of Section 647 of the Penal Code of the state. It is said that on or about the 22nd of September of this year, he was willfully and unlawfully a dissolute person. Now, this Section 647 is what we ordinarily term the vagrancy section of our statutes, and it has a number of specifications as to what constitutes vagrancy, and it says that if a person comes within that category, he is a vagrant and is guilty of a misdemeanor. Now, insofar as it applies to this case, Subsection 5 of Section 647 of the Penal Code provides that every dissolute person is a vagrant and is guilty of a misdemeanor. Now, dissolute is defined as "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched." Now, the word "dissolute", as you see from this definition, covers many acts not necessarily confined to immorality. Other laxness and looseness and lawlessness may amount to dissoluteness. Now, we should advise you at this point, I think, that the defendant is not charged in this case with any violation of any particular act, but he is charged with being a person

of a certain status, or a person being in a certain condition. [fol. 55] His character is involved. Vagrancy is a status or a condition and it is not an act.

You are not to determine in this case whether he committed any of the acts which are the subject of the evidence, except insofar as you may consider them in determining his status or his condition or his character. You may, however, consider these alleged acts and statements in determining what his character is, or what his status is, because character is not subject to inspection, obviously, and it can be determined only by an inference to be drawn from conduct. And it is, therefore, proper in support of this charge for the People to prove the conduct of the defendant which tends to indicate his character, even though the conduct occurred at some time before the date of the charge.

Vagrancy is a continuing offense. It differs from most other offenses in the fact that it is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. One is guilty of being a vagrant at any time and place where he is found, so long as the character remains unchanged, although then and there innocent of any act demonstrating his character.

Now, one of the meanings of dissolute is lawless. If you should determine from the evidence beyond a reasonable doubt that the defendant is lawless, you might consider that he was therefore dissolute. To determine whether or not [fol. 56] he is lawless, you may consider specific violations of law as evidence of such character, whether or not such violations resulted in his arrest or conviction, if you believe beyond a reasonable doubt that such violations were actually performed by the defendant. His character, as I said before, is the ultimate question for you to decide. You might be convinced beyond a reasonable doubt that he had committed any or all of the specific law violations of which there is evidence in the case, and still not conclude that he was of a lawless and hence of a dissolute nature. On the other hand, you might determine that he was lawless and hence dissolute, even though you determine that he committed less than all of the violations of which there is evidence in this case. Nor is it necessary that you determine that he is lawless if you determine beyond a reasonable

doubt that he is in other respects a dissolute person. And if you find that he is a dissolute person in other respects, you must return a verdict of guilty.

In determining whether he has committed any violations of law for the above purposes, you must be bound by the following instructions:

It is unlawful for any person to beg, or ask, or solicit, or receive alms for his own benefit in or upon any street, or sidewalk, or park, or in and upon any doorway or hallway, or entrance to a building, or lot, in the city of Los Angeles, and that it is no less unlawful because such person used [fol. 57] or intended to use, such alms to procure the necessities of life, or to procure the services of an attorney to defend him in a criminal prosecution, or to enable him to support himself so that he can devote all of his time and effort to the dissemination or advancement of his political, social, economic, or other views.

It is also unlawful for any person within the limits of any public park to indulge in any indecent conduct or indecent language. It is unlawful for any person to willfully and with malicious intent injure another by slander. Slander is defined as malicious if defamatorily uttered intending to impeach the honesty, or intergrity or virtue, or reputation, or disclose the actual or alleged defects of one who is living, and thereby to expose him to public hatred, or contempt, or ridicule. The injurious utterance of slander is presumed to have been malicious save when it is a communication to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information. However, if it appears to the jury that the matter charged as slanderous is true, and was usttered with good motives, and for justifiable ends, the utterance is not unlawful.

It is a violation of law for any person to willfully and [fol. 58] maliciously disturb the peace, or quiet of, any neighborhood or person by offensive conduct, or by traducing, or by using any vulgar or profane or indecent language within the presence or hearing of women or children in a loud and boisterous manner. Traducing means to expose

to contempt or to shame through derogatory or slanderous remarks. It means to vilify.

In arriving at your verdict you are not to consider the admitted facts that the defendant on numerous occasions distributed handbills, papers, or other literature in Pershing Square. That is not involved in this case.

Also, the defendant is not on trial for his political opinions. And you are not to consider the particular characteristics of the political opinions of the defendant in your arrival at a verdict in this case.

Now, a function of free speech is to incite dispute. It may indeed best serve its high purpose when it induces a condition of unrest; creates dissatisfaction with conditions as they are, or even stirs people to anger. Freedom of speech, though not absolute, nevertheless, is protected against censorship or punishment, unless it is shown likely to produce a clear and present danger of a serious substantive evil that arises far and above public inconvenience or annoyance or unrest. The constitutional guarantee of free speech does not permit nor protect any advocacy of the overthrow of the government of the United States by force [fol. 59] or violence.

Now, both the People and the defendant in this case are entitled to the individual opinion of each member of the jury, and no member of the jury should vote for the conviction of the defendant, or for his acquittal, only because of the opinion of the other members of the jury. No juror holding a reasonable doubt of the defendant's guilt should compromise his views of the case only to reach a verdict, or solely because a greater number, or even all of the other jurors hold a contrary opinion. This does not mean, however, that you should not consult together and try to agree upon a verdict. It does mean that the majority rule does not apply in the jury room in a criminal case.

Now, much depends upon your attitude as you go into the jury room, members of the jury. Some times a juror upon initially entering the jury room expresses his opinion in the case and of his determination to adhere to it. Now, this expression of opinion and determination is not always productive of good, because the juror after discussion with the other jurors, although he may be advised that the position he originally assumed is not tenable and desires to change

his opinion, may hesitate from doing so for the simple reason that he has expressed his determination to stick to it. These expressions do not advance the cause of a true verdict.

You are to remember that in this case, or any case, you [fol. 60] are not partisans, but are judges.

Now, it is advisable that if ~~possible~~ a verdict be arrived at in the case. It is not the law that a verdict should be arrived at through a surrender of any of your convictions concerning the evidence or the law of the case. It is desirable, however, that there shall be an end of the litigation both for the benefit of the People and of the defendant, and you will exert all effort to try to reach a verdict. As I said, you are not partisans in the matter, but you are judges. And you will also please remember that you do not decide the case in the courtroom, but you decide it in the jury room. That is the reason we admonish you to hear all of it before you attempt to decide it. Let it be submitted to you before you attempt to decide the case. Fully discuss the evidence, and we advise you to interchange fully your ideas with each other because especially in a lengthy trial of this kind a bit of evidence may have escaped one that may not have escaped the others. That is the reason we have more than one person on the jury. Please, also, remember that there can be no triumph in the jury room except the ascertainment of the truth, and it is not the opinion with which you retire, but the verdict with which you return by which the correctness of your deliberation is to be estimated. Upon your retirement please elect a foreman or forewoman. This being a criminal case, it will be necessary for you all to agree upon a verdict before it may become a verdict. The clerk will [fol. 61] please swear the bailiff.

[fol. 62] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 63] Judge's Certificate

I hereby certify that the foregoing transcript, consisting of pages 1 to 17 inclusive, is true and correct, and the same it settled, allowed and made a part of the record of this case.

Dated this 9 day of August, 1951.

Walters, Judge.

[fol. 64] [File endorsement omitted]

IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES, DIVISION No. 15

[Title omitted]

Hon. Byron J. Walters, Judge

OFFER OF PROOF—Filed June 8, 1950

[fol. 65] The Court: The City Attorney has a motion.

Mr. Nielsen: That is correct, Your Honor. On behalf of Captain Walker of the Police Records and Identification Section for the purpose of moving to quash the subpoena duces tecum, which Your Honor has there——

The Court: What do I have here?

Mr. Nielsen: You have both the copy of the subpoena and the affidavit supporting—allegedly supporting the issuance.

The Court: Now, is this the copy or is this the original?

Mr. Nielsen: I believe that is the copy. That is the original affidavit, I believe.

The Court: October 27th. It was filed, at any rate, on October 27th.

Mr. Nielsen: It is the original affidavit, Your Honor, and a copy of the subpoena.

The Court: All right.

Mr. Nielsen: That motion, Your Honor, is based first upon——

The Court: Let me read the affidavit, please.

Mr. Nielsen: That motion, Your Honor, is based upon the provisions of Section 1985 of the Code of Civil Procedure, which states that the application before trial for subpoena duces tecum shall be accompanied by an affidavit specifying the exact matters or things desired to be pro-[fol. 66] duced and setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession, or under his control. I don't believe that any of those appear in the affidavit in question, Your Honor. I think that appears upon the face in no way in full detail the materiality thereof to the issues involved as set up in

the affidavit. Also, it is based upon the cases on that section, the impossibility of production of records such as this. I think in ex parte James in 70 Cal. 638 there is a subpoena duces tecum which purportedly required an employee of the telegraph company to bring in all telegrams that were addressed or sent to certain named persons in the subpoena, and the court in its opinion said it obviously was an impossibility. He not only had to bring in records, but he had to make selections of records.

Your Honor will note from the affidavit or the subpoena here that he requests certain records. Captain Walker on the stand testified that he has under his control about 76 drawers containing—each containing about 6000 of these records, and that if every employee in his division was to drop all other work and apply himself only to this job of securing these particular documents, it would take about nine or ten days' time to secure those documents.

Also, in this case I don't believe that the requested material here is in any way material to the issues in this case. [fol. 67] I do not believe that in any way possible Mr. Gallagher or the defendant can show a desired result from those records.

Therefore, I make this motion to quash the subpoena duces tecum.

Mr. Gallagher: Well, before I argue the matter; I would like to have the officer take the stand and permit me to question him.

The Court: Do you want to call him?

Mr. Gallagher: Yes.

Mr. Hayden: I understand that Captain Walker is in Division 7 at this time.

Mr. Nielsen: He is in Division 7 on another matter.

Mr. Gallagher: Well, we can put it over until he can come in.

Mr. Nielsen: If Your Honor thinks it is necessary. I think my motion is sufficiently based upon the facts, the failure of the affidavit itself to justify the issues in the subpoena.

Mr. Gallagher: Mr. Nielsen has made a lot of gratnitous statements here not under oath about how long it would take to get those documents and so forth.

Mr. Nielsen: Ignoring completely those statements, just based upon the sufficiency of the affidavit itself, I contend it does not comply with the requirements of Section 1985 of the Code of Civil Procedure.

[fol. 68] Mr. Gallagher: Let me——

The Court: I would like to hear from you on that because I have some doubt as to that.

Mr. Gallagher: I did not start this case and I am not the one that is responsible for the issues that have been raised. But one of the issues that was raised is that this defendant is being charged with being a vagrant because he has been convicted of some offenses. That is the way the case stands now.

Well, I want to show by the police records that there are thousands and thousands of individuals in this city that are walking around that have committed many more offenses than this defendant that have never been charged with vagrancy. This case is based upon the fact that this defendant is a lawless person, and therefore, he is a vagrant.

I say it is a fraud. I say it is a frame-up by the City Attorney's office, and I say that the City Attorney's office is in cahoots with the police department to perpetuate this frame-up, and that is why I want these records. I want to show that there are thousands of people here in the city, and that includes also the lawless persons who violate the traffic ordnances, that are not charged with vagrancy. I think it is about time there be a stop to this kind of a matter, this framing of this defendant.

[fol. 69] Now, with reference to the issue, I want to show the discriminatory enforcement of the law. My affidavit says that that is the issue in the case. What more do you want on that? The idea to say that isn't a material issue in this case—Well, the impossibility, we will have to wait on that until the officer comes, just to find out how impossible it is, and how long it is going to take to get these particular records.

Now, with reference to selection, I am not asking for any selection. I am not asking to take up people that have been arrested five times and give me 50 per cent of them, or 35 per cent of them. I am asking him to give me all of those records of persons who have been arrested five times in this city in the last two years. Also, persons who have been

arrested six and seven times; every person in the city that has been arrested more than five times. No selection is required whatsoever. It is a simple matter of putting those cards into a machine, and by an electric process they all come out, as I understand the way they operate. I know full well that this police department can quickly enough get the information for the city prosecutor's office whenever they want any information.

I felt pretty badly yesterday to have to ask that witness if he had ever been convicted of a felony, but that is the situation. The city attorney always has information about the defense witnesses, whether they have committed a [fol. 70] felony or not, but they won't give us information that they have. Just the same as the city attorney's office has information about the jurors, but the defense does not have it, and I say that a defendant cannot have a fair trial when the city attorney's office has information that the defendant does not have, or means of obtaining information that the defendant does not have.

Now, that is the issue, the basis of my argument to this point, and I ask that the case go over now until the police officer can come and we can find out just how many minutes it would take to get those cards.

Mr. Nielsen: May I be heard?

The Court: I don't think the affidavit is sufficient under the law. I have read the cases overnight.

Mr. Gallagher: Was this presented to you yesterday?

The Court: I beg your pardon?

Mr. Gallagher: Was this presented to you before?

The Court: It was presented in connection with the trial.

Mr. Gallagher: This is a new affidavit.

The Court: I understand that, but I have read the affidavit, and I have read the law concerning subpoenas duces tecum after you raised the point in the trial with the officer on the stand.

Mr. Gallagher: This is a new affidavit.

The Court: I cannot help that. I am looking at this affi- [fol. 71] davit, but I read the law last night. The point was raised yesterday.

Mr. Gallagher: I did not know there was any objection made to the affidavit yesterday.

The Court: The whole point was raised.

Mr. Gallagher: I didn't know if it was.

The Court: The witness on the stand—the whole point was raised yesterday, and I read the law concerning subpoena duces tecum. I have a right to go at night and read the law.

Mr. Gallagher: Of course, I am not arguing that.

The Court: I have read the affidavit now. The first time it was presented was at 12:00 o'clock, and under the cases—I will give them to you——

Mr. Gallagher: I think I know probably the cases. I think my affidavit is sufficient under those cases.

The Court: I am ruling that it is not. The motion is granted.

Mr. Gallagher: May I have the cases you are relying on?

The Court: I will be happy to give them to you at recess if you want me to.

[fol. 72] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 73] Judge's Certificate

I hereby certify that the foregoing transcript, consisting of pages 1 to 8 inclusive, is true and correct, and the same is settled, allowed and made a part of the record of this case.

Dated this 9 day of August, 1951.

Walters, Judge.

[fol. 74] In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles

[Title omitted]

On Appeal from the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California.

Byron J. Walters, Judge.

Judgment—Filed October 18, 1951

This cause having been submitted without argument, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment and order appealed from, made and entered in the Municipal Court

of the City of Los Angeles, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

By the Court, Shaw, Presiding Judge; Bishop, Judge.

[File endorsement omitted.]

[fol. 75] [File endorsement omitted]

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

[Title omitted]

NOTICE OF MOTION TO RECALL THE REMITTITUR AND TO VACATE THE JUDGMENT OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT—Filed November 28, 1951

People of the State of California, and Ray L. Chesebro, City Attorney of the City of Los Angeles, Please Take Notice That on Thursday, December 6, 1951 at 9:30 a. m., or as soon thereafter as counsel can be heard in the above entitled court, defendant will move to recall the remittitur and to vacate the judgment of the above entitled court.

Said motion will be made on the ground that said judgment and said issue of the remittitur was occasion- by the inadvertence, and mistake of fact of the defendant and of the clerk of the above entitled court, and on the incomplete presentation of all the facts and law by the defendant to the above entitled court, and on the affidavits of Leo Gallagher and A. L. Wirin, and on all the files, papers, and proceedings herein.

Wirin, Rissman & Okrand, by A. L. Wirin.

[fol. 76] Points and Authorities in Support of Motion

I

Revised Appellate Department Rules, Rule 10 (d):

(d) [Recall of Remittitur] A remittitur may be recalled by order of the court on its own motion, on motion after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion.

II

23 C. Law Review 354:

"It would appear from these cases [reference is made to digest of numerous authorities on the subject] that a remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of all the circumstances of the case on the part of the court, or its officers, whether induced by fraud or otherwise, has resulted in the unjust decision."

Franklin vs. *National Goldstone Agency*, 33 Cal. 2nd 628, 631;

Kellett vs. *Kellett*, 2 Cal. 2nd 45, 48;

Bank of America vs. *Williams*, 89 Cal. App. 2nd 21, 29;

In re Rathrock, 14 Cal. 2nd 34, 39;

Rowland vs. *Kreyenhagen*, 24 Cal. 52, 59;

23 Cal. Law Review 354.

Respectfully submitted, Wirin, Rissman & Okrand, by A. L. Wirin.

[fol. 77] AFFIDAVIT OF LEO GALLAGHER

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Leo Gallagher, being first duly sworn, deposes and says:

That he is an attorney at law, duly admitted to practice before the courts of the State of California;

That he represented the above named defendant in the above entitled matter at the trial in Municipal Court;

That he was notified by post card on or about August 13, 1951 that the appeal in the above entitled matter had been set for hearing in the Appellate Department; that within a very few days after receipt of such notice he personally went to the office of the clerk of the Appellate Department and told the person who was attending the desk that he was not the attorney on the appeal and that A. L. Wirin was the proper person to notify; that the person attending the desk

[fol. 78] assured him that A. L. Wirin would be notified of the date of hearing.

That he has no further direct knowledge of the matter.

Leo Gallagher.

Subscribed and sworn to before me this 26 day of November, 1951. Hannah Gallagher, Notary Public in and for said county and state.

[fol. 79] AFFIDAVIT OF A. L. WIRIN

STATE OF CALIFORNIA,
County of Los Angeles, ss:

A. L. Wirin, being first duly sworn, deposes and says:

That he is an attorney at law, duly admitted to practice before the courts of the State of California;

That prior to August 10, 1951, affiant agreed with the above named defendant to represent the said defendant in the hearing of the appeal of the above entitled matter before the above entitled court; that prior to August 10, 1951 affiant notified Leo Gallagher that affiant would so represent the defendant; that Leo Gallagher agreed to the substitution.

That affiant has received no notice of any further proceedings in the matter; that affiant learned by accident on [fol. 80] or about November 17, 1951 that the said appeal had been ruled on by the Appellate Department.

A. L. Wirin.

Subscribed and sworn to before me this 27 day of November, 1951. Richard W. Petherbridge, Notary Public in and for said County and State.

[fol. 81] Affidavit of Service by Mail (omitted in printing.)

[fol. 82] In the Appellate Departmet of the Superior Court, County of Los Angeles, State of California

[Title omitted]

Order Denying Motion—Filed January 9, 1952

The motion of appellant to recall the remittitur and to vacate the judgment of this court on appeal, in the above entitled action, having been argued and submitted, and duly considered.

Said motion is hereby denied.

Dated January 9, 1952.

Shaw, Presiding Judge; Bishop, Judge; Stephens, Judge.

[File endorsement omitted.]

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] Supreme Court of the United States, October Term, 1951

No. 306, Misc.

Isidore Edelman, Petitioner,

vs.

The People of the State of California

Order Granting Certiorari—May 26, 1952

On petition for writ of Certiorari to the Superior Court of Los Angeles County, Appellate Department, State of California.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby

granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 799 and placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2296)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 85

ISIDORE EDELMAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

BRIEF FOR PETITIONER

A. L. WIRIN,
FRED OKRAND,
ABRAHAM GORENFELD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 85

ISIDORE EDELMAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

BRIEF FOR PETITIONER

Opinions Below

No opinions were delivered by the California Courts below, either upon the conviction of petitioner in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, or upon the affirmance of that conviction by the Appellate Department of the Supreme Court, in and for the County of Los Angeles. Instructions by

the trial court set forth in full Transcript of Record at pages 40 through 49.

Jurisdiction

The judgment of the California appellate court was entered on October 18, 1951 (R. 54). The Appellate Department of the Superior Court is the highest court in California on appeal in a misdemeanor case. (*People* v. *Reed*, 13 Cal. App. 2d 39, Cal. Const. Art. VI, Sec. 4-b and 5.) This Court has jurisdiction under 28 U. S. C. 1257(3) in that the validity of a state statute is drawn in question on the ground of its being repugnant to the United States Constitution, and in that petitioner asserts that he has been denied rights claimed under the United States Constitution. These questions were appropriately raised in the California Courts (R. 15, 26, 45, 50-54). Petition for writ of certiorari was filed on January 18, 1952, and was granted on May 26, 1952, with leave to proceed *in forma pauperis*.

Statement of the Case

Pershing Square is a public park in the downtown area of the City of Los Angeles. During the day, hundreds of citizens could be found there, sleeping in the sun, feeding the pigeons, exchanging ideas or listening to the various park orators. Petitioner was one of those orators.

On September 22, 1949, petitioner was arrested in the park on a complaint charging him with vagrancy as a "dissolute" person (R. 1-2), a violation of subsection 5 of Section 647 of the Penal Code of California, which provides:

> "5. Every idle, or lewd, or dissolute person, or associate of known thieves . . .
>
> "Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Summary of the Evidence

At the time of the trial, the evidence, summarized in the Engrossed Statement on Appeal (R. 1-26), established that petitioner was a familiar figure in Pershing Square. Officer Covelli testified that he had seen petitioner speak 10 or 12 times a night for 18 months (R. 13) and various other witnesses testified they had heard petitioner speak in the park between 20 and 800 times (R. 2, 4, 6, 8, 9, 12, 13, 14, 15, 17). A review of the evidence discloses that petitioner spoke on political, economic, racial, religious and scientific problems (R. 5, 6, 8, 11, 12, 14, 15, 16). At the trial, petitioner testified as to the general content of his speeches (R. 18-21).

Petitioner's views were violently objected to by some members of his audiences. On one occasion he was dunked in the park fountain by a group of sailors and Marines (R. 14, 22). Very frequently, he was subjected to intensive heckling (R. 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 24). Although unqualifiedly contradicted by many defense witnesses and several prosecution witnesses, there is testimony in the record that petitioner reacted to the heckling by calling people "bastards" in the presence of women (R. 2); "fascist bastards, bums, dogs, degenerates, outcast Jews" (R. 5); that he ridiculed and baited men in uniform (R. 3), and referred to them as "rowdies and adolescents" (R. 4), and that he said that "the Catholic Church consisted of liars, promising pie in the sky; that the Pope was the master of a harem of black dressed women" (R. 6).

Langlois, Lamb and Shapiro, three of the leading hecklers, appeared at the trial as the chief witnesses for the prosecution. There was evidence that petitioner had accused Lamb, in cooperation with Langlois, with embezzling money collected for the "Civic Betterment Committee"

and the "American Homestead Association" (R. 3, 4, 5, 6, 7, 22) and that petitioner had accused Shapiro of having been involved in a morals charge (R. 3, 9, 10, 23). There was evidence also that the heckling was organized (R. 12, 14, 16, 17, 22, 23) and of recently begun police interference of petitioner's orations (R. 3). Persons friendly to petitioner or tolerant of him were arrested (R. 15, 16, 23) and petitioner himself testified without contradiction that he had been arrested recently, the first in his life, approximately 63 times, some 13 of the arrests followed by formal bookings on various charges, including a charge of malicious mischief, offensive conduct and defacing property in connection with his standing on a thick cement bench (R. 17-18). As a result of these charges, petitioner was convicted of "begging" some four or five times (R. 17, 13). In addition to the evidence of convictions for "begging", there was evidence that petitioner solicited funds in the park (R. 2, 3, 7, 9, 24) with and without the attendant distribution of literature, primarily his pamphlet "The Myth of the Iron Curtain".

Boyd Taylor, called as a defense witness, tetsified that he is the chief deputy of the criminal division of the city attorney's office, that those who repeatedly violate the Vehicle Code or laws against intoxication are never charged with vagrancy because these offenses do not involve moral turpitude or lax morals (R. 15).

At the time of trial, petitioner secured a subpoena duces tecum directed to the Police Department of the City of Los Angeles, to require production of records for the purpose of establishing that many persons were repeatedly convicted of violating the law, but had not been charged with vagrancy. The trial court granted the motion of Respondent to quash this subpoena (R. 50-54).

Summary of Instructions to the Jury

In instructing the jury, the trial court stated that the word "dissolute" "covers many acts not necessarily confined to immorality. Other laxness and looseness and lawlessness may amount to dissoluteness." (R. 45). "Dissolute" was defined as: "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched" (R. 45).

The trial court emphasized that one of the meanings of "dissolute" is "lawless" (R. 45-48) and instructed the jury that in determining whether petitioner committed any violations of law and was "lawless," it should consider the following: that it is unlawful to beg, to indulge in indecent language, to slander another, to use vulgar or profane language. Each of these crimes was defined in some detail (R. 47-48).

Summary of Proceedings

On November 7, 1949, the jury found petitioner guilty as charged (R. 34). The court denied a motion for new trial, judgment was entered against petitioner and he was sentenced to jail for 90 days, the sentence to run concurrently with a 90 day jail sentence on a charge of "begging" (R. 35, 2). On December 13, 1949, notice of appeal was filed by the attorney then representing petitioner, Leo Gallagher (R. 1).

Thereafter, on February 7, 1950, a substitution of attorneys was filed and granted by the trial court (R. 37). From that time, petitioner has been represented in all proceedings by present counsel, A. L. Wirin and Fred Okrand, including at least 8 court appearances between February 7, 1950 and

June 18, 1950 (R. 37-39) in connection with the settlement of Statement of Appeal.

However, by the mistake of the clerk of the Appellate Court, notification of the filing of the record on appeal, of the time for filing briefs and the time of hearing was mailed to Leo Gallagher, counsel for petitioner at the time of trial, who was then assured that notice would be sent to present counsel. (See affidavits of A. L. Wirin and Leo Gallagher in support of the motion to recall the remittitur, R. 56-57.)

Without the knowledge of present counsel (R. 57), the time for filing briefs expired and the appellate court summarily affirmed the judgment and order of the trial court (R. 54-55). Motion to recall the remittitur and to vacate the judgment of the appellate court was filed, and was denied by that court on January 9, 1952 (R. 58).

Specification of Errors To Be Urged

The Appellate Department of the Superior Court of the State of California erred:

1. In failing and refusing to hold, in effect, that the California "vagrancy-dissolute" statute is invalid as repugnant to the 14th Amendment to the United States Constitution by affirming the conviction of petitioner under a statute so vague, indefinite and uncertain that it fails to set forth ascertainable standards of guilt, thereby depriving him of his liberty without due process of law.

2. In failing and refusing to hold, in effect, that petitioner's right of freedom of speech was impaired by affirming his conviction under a vague and indefinite statute affecting that right.

3. In failing and refusing to hold, in effect, that petitioner's rights as guaranteed by the equal protection clause of the 14th Amendment to the United States Constitution

had been violated by reason of the discriminatory enforcement of the law.

4. In failing and refusing to afford petitioner due process of law in violation of the 14th Amendment to the United States Constitution in the prosecution of his appeal by the denial, in effect, of reasonable notice and opportunity for hearing and the representation of counsel on his appeal.

ARGUMENT

Summary of Facts and Law

Petitioner's argument may be summarized very simply and briefly. Contrary to *Lanzetta* v. *New Jersey*, 306 U. S. 451, he was convicted under a statute so vague, indefinite and uncertain, that even the city attorney's office and the trial court disagreed as to its meaning. Contrary to *Yick Wo* v. *Hopkins*, 118 U. S. 356, he was discriminated against in the administration of the law by being singled out for prosecution under a theory not theretofore used by the city attorney's office and denied a full opportunity to show that discrimination. Contrary to *Winters* v. *New York*, 333 U. S. 507, he, as an orator, prosecuted because of remarks made in the course of his speeches, was denied the right of freedom of speech by conviction under a vague and indefinite statute.

Then, contrary to *Powell* v. *Alabama*, 287 U. S. 45 and *Glasser* v. *United States*, 315 U. S. 60, when petitioner sought vindication in the California appellate court, which he had a right to do, that court summarily affirmed his conviction and subsequently refused to allow him reasonable notice or the representation of counsel in the presentation of briefs and oral argument on his behalf, in the face of the information that what had appeared to be an abandonment of the appeal was a situation caused through the inadvertence of the court's own staff, not by petitioner, or petitioner's former counsel or his present counsel.

I

Petitioner's Conviction Under Subdivision 5 of Section 647 of the Penal Code Deprived Him of Liberty Without Due Process of Law, Because the Statute Is Vague, Indefinite and Uncertain.

Subdivision 5 defines a vagrant as "Every idle, or lewd, or dissolute person, or associate of known thieves."

This court in *Lanzetta v. New Jersey*, 306 U. S. 451, 458, stated there were serious doubts as to the certainty of the phrase "any person not engaged in a lawful occupation." There are also serious doubts as to the word "idle" in the California statute. In *In Re McCue*, 7 Cal. App. 765, —, the court stated: "We are inclined to the view that while idleness . . . is a prolific source of crime, still it is not competent for the Legislature to denounce mere inaction as a crime without some qualification." But see *Ex parte Cutter*, 1 Cal. App. 2d 279.

Doubts exist also as to the phrase in the California statute, "associate of known thieves." In *Lanzetta v. New Jersey, supra*, this court declared ambiguous the phrase "known to be a member of any gang", commenting at page 458: "If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons." In *People v. Alterie*, 356 Ill. 307, 190 N. S. 301, the court held similar phraseology in the Illinois vagabond statute defining the crime as dependent on reputation a violation of due process. The California statute not only is vague and indefinite in the use of the phrase "known thieves" but goes further into the realm of speculation by making an "associate" of "known thieves" a vagrant. Must the "associate" have knowledge of the reputation? Must the "association" be such as to impute a similar reputation to the "associate", or may it be entirely divorced

from any connection with such reputation? May the "association" be with just one "known thief" or must it be with more than one?

As petitioner was found by the jury to be "guilty of the offense charged" (R. 34), presumably his conviction was based on the construction of the statute given in the trial court's instructions (R. 40-49), and constructions of the statute and of the word "dissolute" in the statute by other California courts is immaterial, as not, of course, considered by the jury. *Stromberg* v. *California*, 283 U. S. 359, 367; *Terminiello* v. *Chicago*, 337 U. S. 1, 4. For example, petitioner was not convicted of the "infamous crime against nature" as in *People* v. *Babb*, 103 Cal. App. 2d 326, where the court held that vagrancy was an included offense. Nor was petitioner charged with "dancing in the nude at a smoker" (*People* v. *Scott*, 113 Cal. App. (Supp. 778), or "indecent exposure" (*Ex parte Keddy*, 105 Cal. App. 2d 215), or "living with a prostitute" (*People* v. *Lund*, 137 Cal. App. 781), or of being a "peeping Tom" (*People* v. *Allington*, 102 Cal. App. 2d 914) or of other activities under which a construction of the terms "dissolute" and "lewd" as interchangeable, each applying to the unlawful indulgence of lust, may have seemed appropriate. See *In re McCue*, 7 Cal. App. 765.

The trial court confined the instructions to "what the evidence has been" (R. 44), and the instructions contained no definition of the word "lewd", nor was "unlawful indulgence of lust" mentioned. Aside from specific instructions on what could be considered "lawless", "lewd" and other terms importing an "unlawful indulgence of lust" were used but once in the entire instructions, in the general definition of "dissolute" as

> "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual

pleasures, profligate, wanton, lewd, debauched." (R. 45.)

Admittedly, the evidence showed that petitioner, between arrests, was "loosed from restraint" in one sense of the phrase, and as he persisted in his oratory in the park despite the arrests, to some extent "unashamed". With the exception of "lawless", however, the record discloses little if any evidence of guilt under the other terms of the general definition, unless criticism of the morals of others, albeit made in what may have been rather vigorous language, shows indulgence in lust by some vicarious process.

Emphasis was placed on "lawless", however, in the instructions (R. 45-48), and this appeared to be the theory of the prosecution in the trial of the case (R. 52). This, it is submitted, was error, and where error occurs which, within the range of reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. *Little* v. *United States*, 73 Fed. 2d 861, 867 (C.C.A. 10th), and see *Stromberg* v. *California*, *supra*.

What does "lawless", and thereby "dissolute" mean? In *Lanzetta* v. *New Jersey*, *supra*, 306 U. S. at 453, this court declared that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

The trial court was informed by the city attorney's chief deputy that only where persons were repeat violators of crimes involving *moral turpitude or lax morals* were they prosecuted under this statute (R. 15), yet that court allowed the presentation of evidence of crimes not involving moral turpitude and instructed the jury that: "Now, the word 'dissolute', as you see from this definition, covers

many acts *not necessarily confined to immorality*. Other laxness and loosenes and lawlesness may amount to dissoluteness" (R. 45).

In *People* v. *Alterie, supra*, the court held that the Illinois vagabond statute offended due process because of the uncertainty of the phrase "all persons who are reputed to be habitual violators" of the law. The court stated that the statute nowhere defined "habitual violators." The same vice inheres in the word "lawless."

This argument is particularly forceful in view of the instruction given by the trial court:

> "You might be convinced beyond a reasonable doubt that he had committed any or all of the specific law violations of which there is evidence in the case, and still not conclude that he was of a lawless and hence of a dissolute nature. On the other hand, you might determine that he was lawless and hence dissolute, *even though you determine that he committed less than all of the violations* of which there is evidence in this case" (R. 46). (Italics added.)

Thus, the jury could have convicted petitioner upon determining that he committed one crime. In addition, although instructions were given that there should be a conviction only "if you believe beyond a reasonable doubt that such violations were actually performed by the defendant" (R. 46), as it was emphasized that the ultimate issue was his "character" (R. 45-46), it is possible that under these instructions, the jury concluded that petitioner was of a "lawless" "character" on the basis of twelve separate offenses as to no one of which all 12 members of the jury, differently instructed, would have agreed beyond a reasonable doubt. Under both the California Penal Code, section 15 and the basic theory of American criminal law (see, *People* v. *Alterie, supra*), crimes must be based on overt acts or omissions, not on guilty intentions. One may

be found guilty of being a "vagrant" only upon a finding of guilt beyond a reasonable doubt of the act or acts supporting such a characterization. See *People v. Klein*, 292 Ill. 420, 127 N. E. 79.

If a person may be convicted of vagrancy upon a showing of the commission of any crime, felony or misdemeanor, involving moral turpitude or not; under the catch-all term "dissolute" construed as "lawless", the statute offers no reasonable standard of certainty. As the California Supreme Court stated in *People v. Lee*, 107 Cal. 477, 480, "A person . . . charged with vagrancy is of right entitled to know whether he is called upon to meet the charge of being a common drunkard, or as being a dissolute associate of known thieves, or being a healthy beggar . . ." or otherwise.

Under the California Penal Code section 644, persons have notice that a third separate conviction of a felony may subject them to the punishment prescribed for "habitual criminals". See *People v. d'A Philippo*, 220 Cal. 620, certiorari denied, 293 U. S. 614. For persons successively convicted of separate misdemeanors, there is no notice from the specific language of the vagrancy statute that it was intended to be used as a "habitual criminal" statute for misdemeanants, nor does the charge with "dissoluteness" appear reasonably to give notice of such intention. This court stated in *Cole v. Arkansas*, 333 U. S. 196, 201: "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

It is not beyond the realm of probability that under the evidence presented and the trial court's instructions on

lawless, the jury found petitioner guilty because 1. he had a series of convictions for "begging" or 2. there was evidence of begging aside from the convictions. If the conviction was based on his prior convictions, he was, in effect, tried twice for the same crime. If the conviction was based on the evidence of begging aside from the convictions, petitioner was convicted under a subsection of which he had not been charged with violation (Penal Code, Section 647, Subdivision 2). In *Cole* v. *Arkansas*, *supra*, this court held this to be a violation of the due process clause, saying (333 U. S. at 201): "It is as much a violation to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

II

Petitioner's Right of Freedom of Speech Was Impaired By Reason of His Conviction Under a Vague and Indefinite Statute.

Petitioner's conviction was based upon the remarks made by him in the course of his speeches in Pershing Square. Because of these remarks, he was found to be a "lawless" person, and therefore, "dissolute." In instructing the jury, the trial court stated that, in determining whether petitioner committed any violations of law, the jury should consider the following: that it is unlawful to beg, to indulge in indecent conduct or indecent language, to slander another, to use vulgar or profane language. Each of these crimes was defined in some detail (R. 47-48).

Since the verdict was general, it cannot be determined what crimes the jury found the defendant to have committed, nor upon which instruction the conviction was based. Thus, if any of the instructions gave the statute a meaning which offended the constitutional rights of petitioner, this

court will invalidate the conviction. *Terminiello* v. *Chicago*, 337 U. S. 1.

In defining slander, the trial court used the same language which was condemned in *State* v. *Klapprott*, 127 N.J.L. 395, 22 A(2d) 877, cited with approval in *Winters* v. *New York*, 333 U. S. 507. In the *Klapprott* case, the New Jersey court had under consideration a state law prohibiting speech which "in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group" because of race, color, etc. In holding the statute unconstitutional, the court made the following statement, which this court quotes in the *Winters* case:

". . . That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and undefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. . . .", (127 N.J.L. 395, pp. 401-402).

The same difficulty arises in the instant case. In the *Winters* case, this court stated, at page 509:

"It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."

III

The Discriminatory Enforcement of the Law Violated Petitioner's Rights Under the Equal Protection Clause.

At the time of trial, petitioner's counsel made the following offer of proof in connection with the motion of the

People to quash the subpoena duces tecum requiring the Police Department to produce certain records:

"But one of the issues that was raised is that this defendant is being charged with being a vagrant because he has been convicted of some offenses. That is the way the case stands now.

"Well, I want to show by the police records that there are thousands and thousands of individuals in this city that are walking around that have committed many more offenses than this defendant that have never been charged with vagrancy" (R. 52).

This offer of proof was rejected by the trial court, although material to the issue of equal enforcement. Such proof would have shown the existence of the situation condemned in *Yick Wo* v. *Hopkins*, 118 U. S. 355.

A review of the record shows evidence that petitioner was not only being prosecuted under a theory contrary to the usual prosecution of the City attorney's office (R. 15), but that petitioner was frequently arrested, and persons supporting petitioner were arrested (R. 15, 16, 23). In the course of a little over one year, petitioner had been convicted of "begging" 4 or 5 times. Vagrancy is but one crime, *People* v. *Allington*, *supra*, and although a continuing one until reform (chronic rather than acute, *People* v. *Craig*, 152 Cal. 42), it is submitted that an enforcement of the law which, in addition to the other circumstances and prior convictions, results in two separate sentences for the crime on one day (R. 2) though given to run concurrently, indicates a seemingly overprecautious desire to have petitioner feel the full brunt of the law.

In *Yick Wo* v. *Hopkins*, *supra*, this court declared at pages 373-374: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal

hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

IV

Petitioner Was Denied Notice and Opportunity for Hearing and Representation of Counsel in the Appellate Court in Violation of the Due Process Clause.

At the time of trial, petitioner was represented by Leo Gallagher. On February 7, 1950, a substitution of attorneys was filed and granted (R. 37). Subsequently, petitioner was represented in all proceedings by present counsel. Leo Gallagher's name appeared on the Notice of Appeal filed, and, despite the substitution of attorneys and appearances by present counsel shown on the Docket Entries (R. 37-39) then on file in the appellate court, notice of appeal was sent to Leo Gallagher, and no notice was sent to present counsel. On page 10 of Respondent's Brief, the assertion is made: "If there was a failure of representation in the appellate court it was caused by petitioner's act of changing counsel and by reason of his trial counsel's failure to forward the notice of hearing to the substituted counsel."

In fixing the cause for the "failure of representation", Respondent appears to have overlooked the affidavit of Leo Gallagher (R. 56-57) stating that a very few days after receipt of the notice, he was personally assured by the person attending the desk in the Appellate Department that A. L. Wirin, one of present counsel, would be notified. That was approximately two months before the affirmance of the conviction by judgment reciting "This cause having been submitted without argument . . ." (R. 54)

As for petitioner's change in counsel, whatever his reasons, whether financial, or caused by the pressure of other

work by his trial attorney, if reasonable, petitioner was entitled as a matter of right to make a change. *People* v. *Durrant*, 119 Cal. 201, *People* v. *Lanigan*, 22 Cal. 2d 569. Petitioner's reasons were apparently considered reasonable by the trial court when it granted the substitution during the lengthy proceedings for settling the record on appeal, and when the substitution was brought to the attention of the appellate court and no allowance there made for it, he was denied reasonable notice and opportunity for hearing, essential requisites of due process of law. See *Powell* v. *Alabama*, 287 U. S. 45, 68, *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 476.

Under the California Constitution, Article 1, section 13, "In criminal prosecutions, *in any court whatever*, the party accused shall have the right to . . . appear and defend, in person and with counsel. . . ." (Italics added). These rights would imply but empty words if they were not available in the appellate process. The California courts have held "The right of appeal in criminal cases is guaranteed by the constitution and is as sacred as the right to a trial by jury. It is one of the means provided by the law to determine the guilt or innocence of the accused." *Ex parte Hoge*, 48 Cal. 3; *In re Adams*, 81 Ca. 163; *Smith* v. *McCallum*, 36 Cal. App. 143; *In re Albori*, 95 Cal. App. 42. It is the duty of the appellate court to afford the appellant protection in the presentation of his appeal. *In re Albori, supra.*

In *Glasser* v. *United States*, 315 U. S. 60, 76, this court stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." In *Powell* v. *Alabama, supra*, this court stated: "Under the circumstances disclosed, we hold that defendants were not accorded the right to counsel in any sub-

stantial sense. To decide otherwise, would simply be to ignore actualities."

It is submitted that when the circumstances were disclosed to the appellate court with the Motion to Recall the Remittitur and to Vacate the Judgment of that court, it indulged in nice calculations and ignored actualities when it denied the motion, in effect holding that that petitioner's right of appeal had not been violated, nor due process.

Conclusion

The judgment below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 85

ISIDORE EDELMAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED

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BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner, Isidore Edelman, was arrested and charged in a verified complaint with a violation of the provisions of subdivision 5 of Section 647 of the Penal Code of the State of California. The trial began on October 26, 1949, and continued through nine days. The jury found petitioner to be guilty of the offense charged on November 7, 1949. Petitioner's motion for a new trial was denied and he was sentenced to serve 90 days in the City Jail. A notice of appeal was filed; bail on appeal fixed and posted by appellant [R. 1-2; 36]. An Engrossed Statement on Appeal was allowed, settled;

certified and signed by the trial judge on June 18, 1951 [R. 39; 1-26].

On October 18, 1951, the Appellate Department of the Superior Court of Los Angeles County made its order affirming the judgment and order appealed from without written opinion, the cause having been submitted without briefs or argument [R. 54-55]. Thereafter petitioner served notice of motion to recall the remittitur and to vacate the judgment of the Appellate Department of the Superior Court [R. 55-56]. This motion was supported by affidavits [R. 56-57]. The motion was duly made, argued before the Appellate Department of the Superior Court, and, on January 9, 1952, denied [R. 58]. Certiorari was thereafter granted by this court.

I.

The Supreme Court of the United States Should Not Take Jurisdiction to Review a Judgment Where No Opinion Was Delivered by the Highest State Court.

The record and the petition upon which this court granted certiorari show that no opinion was delivered by the Appellate Department of the Superior Court of Los Angeles County [R. 58; Pet. p. 1, line 26]. Said appellate court therefore did not in any way pass upon any federal questions.

The petition recites:

> "On expiration of the time for filing appellant's brief, the appellate court summarily affirmed the judgment and order of the trial court without any briefs or oral argument having been presented on behalf of petitioner." [Pet. for Writ, p. 15, lines 11-15.]

The notice of motion to recall the remittitur recites that "said motion will be made on the ground that said judgment and said issue of the remittitur was occasioned by the inadvertence and mistake of fact of the defendant, etc." [R. 55]. The motion to recall the remittitur and to vacate the judgment was argued, submitted and duly considered by the appellate court and denied [R. 58].

The extraordinary remedy of a recall of a remittitur may be granted where the court lacked jurisdiction to pronounce judgment, or where fraud, imposition on the court, or judicial misapprehension of the facts has resulted in an erroneous judgment, but where none of these circumstances appears, such recall will not be granted for mere errors of law or procedure.

People v. Stone, 93 Cal. App. 2d 858.

The record discloses that petitioner was represented by Leo Gallagher, attorney at law, during the trial commencing on October 25, 1949, and concluding on November 7, 1949 [R. 28-34]. Leo Gallagher was present and represented petitioner in the proceedings which terminated with the pronouncement of judgment on December 12, 1949 [R. 34-35]. The notice of appeal from that judgment was filed by Mr. Gallagher as attorney for defendant [R. 1].

The affidavits in support of the motion to recall the remittitur acknowledges that Leo Gallagher received notice of the setting of the matter for hearing in the Appellate Department of the Superior Court [R. 56].

The order of the Appellate Department of the Superior Court affirming the judgment of conviction indicates that the matter before it was submitted for decision without appearance of counsel or argument [R. 54]. It is there-

fore apparent that the Appellate Department of the Superior Court had not been called upon to or did decide a federal question in any manner whatsoever.

The appellate jurisdiction of the United States Supreme Court over a state court cannot be based upon the supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court.

Cincinnati, H. O. & T. P. Ry. Co. v. Slate, 216 U. S. 78.

In a recent decision by this court, *Stembridge v. State of Georgia*, 96 L. Ed. (Adv. Ops.), No. 16, page 753, decided May 26, 1952, it was held that where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment and that constitutional questions must first be raised in the trial court. That case was dismissed after the granting of the petition for certiorari.

Petitioner asserts in his petition, page 2, line 7, to page 3, line 15, that he properly raised the constitutional questions in the trial and appellate courts by making exceptions to the evidence and by way of motion for new trial, and as one of the grounds of appeal presented. The Engrossed Statement on Appeal sets forth a summary of the evidence of the trial with no showing of any rulings of the court or of any objections or exceptions made [R. 1-26]. The docket entries of the trial show that defendant's motion for new trial was made on November 14, 1949, and denied on December 12, 1949 [R. 34-35]. It is noted that no motion in arrest of judgment appears to have been made in the trial court. Nowhere does the

record show what grounds were urged in making the motion for a new trial. Where the record on appeal simply shows that a motion for new trial was made and denied, but fails to disclose what matters were argued, under such circumstances the order will be affirmed on appeal. (*People v. Beatcher*, 136 Cal. App. 337; *People v. Serpa*, 67 Cal. App. 2d 327.) A ground of appeal does not in any way call a court's attention to or require a ruling as to its merit. As no briefs were presented or any argument made in the appellate court, the claimed federal questions appear for the first time in the Petition for Writ of Certiorari.

The petition further discloses that at the time of its filing, petitioner was committed in jail [Pet. p. 7, lines 8-12]. The remedy of habeas corpus was available to him to test the constitutional questions now raised. There is no assertion that he sought or was denied such remedy in the state courts.

The judgment of the Appellate Department of the Superior Court clearly indicates that no action was taken nor was that judgment based upon the question of any federal constitutional right [R. 54].

Respondent fails to see how the Appellate Department "in effect" held contrary to any decision of this court where they did not have the benefit of briefs or argument raising any question whatever.

Where no appearance is made on the date set for argument and no briefs have been filed, there is no duty on an appellate court to search a record and consider possible contentions for an appellant.

People v. Giduey, 10 Cal. 2d 138;
People v. Dorsey, 78 Cal. App. 2d 804.

Where an appellant files no briefs and no appearance is made for him when the case is called for hearing, the judgment of conviction is affirmed.

People v. Sukovitzen, 67 Cal. App. 2d 901.

II.

Subdivision 5 of Section 647 of the Penal Code of the State of California Is Constitutional.

Petitioner asserts in his Petition for Writ of Certiorari that the appellate court has, in effect, decided that the statute under which he was convicted was not so vague, indefinite and uncertain as to deprive him of his liberty without due process of law. Assuming solely for the purpose of argument that this point is properly presented, it is submitted that subdivision 5 of Section 647 of the Penal Code is constitutional. This section provides:

> "Every idle, or lewd, or dissolute person, or associate of known thieves, is a vagrant and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or both such fine and imprisonment."

The District Court of Appeal of the State of California, in the case of *People v. Babb*, 103 Cal. App. 2d 326, held this subdivision and section to be constitutional as against a contention that it failed to state a public offense. That court held the terms "lewd" and "dissolute" to be terms often used interchangeably; that each applies to the unlawful indulgence in lust, whether in public or private; that "lewd" was defined to mean lustful, libidinous, lascivious and unchaste; "dissolute" to mean loose in morals and conduct, wanton, lewd and debauched.

In the case of *State v. Harlow*, 174 Wash. 227, the court held a similarly worded statute to be constitutional. That court said the words "lewd," "disorderly" and "dissolute" are words of common and general use, and are easily understood by men and women of average intelligence; that it doubted whether definition could make them clearer.

In passing upon the subdivision and section here involved, the District Court of Appeal of California in the case of *In re McCue*, 7 Cal. App. 765, answered the contention that there had been a violation of due process in that the petitioner was charged with being an idle, lewd and dissolute person, and that he had not been sufficiently advised of the character of his offense, by stating:

> "The constitutional right of due process of law will not render impossible laws which are generally admitted to be essential to the safety and well being of society . . . To say that the Legislature must specify the many evil and corrupt practices which constitute one a lewd or dissolute person would often render the enforcement of a police regulation in connection therewith impossible, and this without considering the indelicacy and impropriety of expression which would often be necessary."

In the case of *People v. Scott*, 113 Cal. App. (Supp.) 778, the Appellate Department of the Superior Court of Los Angeles County stated that where the legislature of a state has taken upon itself the regulation of vagrants by statute, the words therein must bear the interpretation thereby made or intended; that "dissolute" was defined to mean loosed from restraint, recklessly abandoned to sensual pleasures, profligate, wanton, lewd and debauched.

The Appellate Department of the Superior Court of Los Angeles County has held this subdivision and section to be constitutional against challenges similar to those set forth in the petition herein, in the cases of *People v. Elliott*, Cr. A. 2446; *People v. Nichols*, Cr. A. 2622, and *People v. Dragna*, Cr. A. 2819.

The requirements of reasonable certainty do not preclude the ordinary terms to express ideas which find adequate interpretation in common use and understanding.

Sproules v. Binford, 286 U. S. 374, 393.

III.

Decisions of the Highest Court of the State on Matters of State Law Are Controlling.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleston v. Dwyer, 322 U. S. 232, 236.

Until such time as the case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.

Vanderbach v. Owens Illinois Glass Co., 311 U. S. 538, 543.

The decisions of the California courts upholding the constitutionality of subdivision 5 of Section 647 of the Penal Code of California, set forth under Point II hereof, should be controlling upon this court as applied to the laws of the State of California.

IV.

Petitioner Was Not Denied Due Process of Law in the State Courts.

Petitioner asserts in his petition that he was denied due process of law in the appellate proceedings [Pet. p. 16, line 3]. He also asserts that there are no cases to be found to support that statement [Pet. p. 15, lines 21-25; p. 16, lines 18-21]. The docket entries of the trial in the Municipal Court proceedings disclose that petitioner was represented in all stages of that proceeding [R. 27-35].

The Revised Appellate Department Rules provide for notice of hearing as follows:

> "Rule 3. Calendars and notice of hearing.
>
> (a) [Calendar.] The clerk of the court, unless otherwise ordered, shall place upon the calendar for hearing at each regular session all appeals of which such department has jurisdiction, wherein the records on appeal were filed in civil cases not less than 17 days prior to the date of the session, and in criminal cases not less than 12 days prior to the date of the session. Any appeal may, by order of the presiding judge or the department, be placed on the calendar for hearing at any session of the department.
>
> (b) [Notice of hearing.] As soon as the record on appeal in any case is filed, the clerk shall mail to the attorney appearing of record for each party, or if any party has appeared without attorney, then to such party personally, at the address of such attorney, or party appearing in the record, a notice stating that said record has been filed and giving the date at which the appeal will be heard and the dates when

each party must file briefs, as provided in these rules. Failure of the clerk to mail any such notice shall not affect the jurisdiction of the Appellate Department."

The affidavit of Leo Gallagher, filed in support of the motion to recall remittitur, shows that he received a post card advising him that the matter had been set for hearing in the Appellate Department of the Superior Court [R. 56]. As heretofore pointed out, the name of Leo Gallagher appeared on the Notice of Appeal filed, and from the affidavit heretofore mentioned he was duly notified of the time set for hearing [R. 1]. There appears no action by any court which tended to deny petitioner due process of law at any stage of these proceedings. If there was a failure of representation in the appellate court it was caused by petitioner's act of changing counsel and by reason of his trial counsel's failure to forward the notice of hearing to the substituted counsel. From the record before the appellate court, Leo Gallagher appeared to be the attorney of record for petitioner.

Notice and hearing together with a legally competent tribunal having jurisdiction of the case constitute basic elements of the constitutional requirement of due process.

Powell v. Alabama, 287 U. S. 45.

There is no requirement that an appellate court must await the appearance of an appellant in order that it may decide a case regularly before it or investigate the reason for such non-appearance where notice is mailed in accordance with the rules.

V.
Conclusion.

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not heretofore determined by this court.

There appears in this case no reason, either in law or in good conscience, why the petition should be heard or granted without first having the highest court of the State of California express its opinion on the questions here raised. The matter should be dismissed.

Respectfully submitted,

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DONALD M. REDWINE,
PHILIP E. GREY,
BOURKE JONES,

By BOURKE JONES,

Attorneys for Respondent, the People of the State of California.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of August, A. D. 1952.

8-25-52—60